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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 301

GUARANTY TRUST COMPANY OF NEW YORK, EXECUTOR, ESTATE OF LAMAR L. FLEMING, DECEASED, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 10, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 78362

GUARANTY TRUST COMPANY OF NEW YORK, Executor, Estate of Lamar L. Fleming, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:

For Taxpayer: Weston Vernon, Jr. Esq.; Walter D. Fletcher, Esq.

For Comm'r: R. H. Transue, Esq., Harold Allen, Esq., J. W. Smith, Esq.

1935.

Jan. 19. Petition received and filed. Taxpayer notified. (Fee paid)

" 19. Copy of petition served on General Counsel.

Feb. 12. Answer filed by General Counsel.

Feb. 16. Copy of answer served on taxpayer.

Sep. 11. Hearing set Nov. 11, 1935.

Nov. 11. Hearing had before Mr. J. R. Leech, Div. 6. Submitted. Stipulations of facts filed. Petitioner's

[fol. 2] brief due Dec. 2, 1935—respondent's due Dec. 20, 1935—petitioner's reply due Jan. 2, 1936. Notice of appearance of Weston Vernon, Jr. and Walter D. Fletcher, filed.

Nov. 18. Transcript of Nov. 11, 1935 filed.

Dec. 2. Brief filed by taxpayer. 12/2/35 copy served.

Dec. 20. Brief filed by General Counsel.

Dec. 26. Notice of Appearance of Walter D. Fletcher as counsel filed.

1936.

Jan. 9. Motion for leave to file reply brief, reply brief lodged, filed by taxpayer. 1/13/36 granted. 1/21/36 copy served.

Apr. 21. Findings of fact and opinion rendered, J. R. Leech, Div. 6. Decision will be entered under Rule 50.

May 12. Notice of settlement filed by General Counsel.
May 14. Hearing set June 3, 1936 on settlement.
May 29. Computation of deficiency filed by taxpayer. 5/29/36 copy served.
Jun. 3. Hearing had before Mr. Leech on settlement under Rule 50. Not contested.
[fol. 3]
Jun. 4. Decision entered, J. Russell Leech, Div. 6.
Aug. 21. Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by General Counsel.
Aug. 29. Proof of service filed.
Aug. 29. Affidavit of service filed.
Oct. 16. Motion for extension to 12/5/36 to prepare and settle record filed by General Counsel.
Oct. 16. Order enlarging time to 12/5/36 for preparation of evidence and delivery of record entered.
Oct. 17. Præcipe filed with proof of service thereon.
Oct. 23. Præcipe filed with proof of service of præcipe and notice of præcipe filed.

[fol. 4] Before United States Board of Tax Appeals

Docket No. 78362

Guaranty Trust Company of New York, Executor, Estate of Lamar L. Fleming, Petitioner,

against

Commissioner of Internal Revenue, Respondent

Petition

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency. (IT:AR:H-1:FBN-90D) dated October 25, 1934, and as the basis of its proceeding alleges as follows:

1. The petitioner is an executor of the estate of Lamar L. Fleming, deceased; its address is 140 Broadway, New York, N. Y.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit "A") was mailed to the petitioner on October 25, 1934.

3. The taxes in controversy are income taxes of the deceased taxpayer for the period from January 1 to December 16, 1933, amounting to $39,874.31.

[fol. 5] 4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The commissioner erred in determining that there should be included in income of the deceased taxpayer for the period January 1 to the date of the decedent's death on December 16, 1933, not only the decedent's share of the profits of the partnership of Anderson, Clayton & Fleming for the fiscal year August 1, 1932 to July 31, 1933, but also the decedent's share of the profits of the partnership from August 1, 1933, to the date of the decedent's death on December 16, 1933.

(b) The commissioner erred in determining that there should be included in income of the decedent for the prior-to-death period from January 1 to December 16, 1933, the decedent's share of profits earned by such partnership over sixteen and a half months, thus including in income for one taxable period more than one year's income.

(c) The Commissioner erred in failing to determine that the only taxable year of such partnership which ended within the taxable period covered by the prior-to-death return of the decedent, was the fiscal year of such partnership ended July 31, 1933.

(d) The Commissioner erred in determining that there should be included in income for the period prior to the death of a decedent who kept his books and made his income tax returns upon the cash receipts and disbursements basis, amounts neither actually nor constructively received [fol. 6] by the decedent prior to his death and not received by the decedent's representatives during the calendar year in which the decedent died.

(e) The Commissioner erred in determining that there should be included in income of the decedent for the period January 1 to December 16, 1933, the amount of $63,494.46, referred to in the notice of deficiency as the decedent's share of profits of the partnership of Anderson, Clayton & Fleming for the period August 1 to December 16, 1933, and the further amount of $5,509.19 representing interest

on the decedent's capital and undistributed earnings of the partnership.

5. The facts upon which the petitioner relies, are as follows:

(a) Lamar L. Fleming died on December 16, 1933. Under his will the Guaranty Trust Company of New York and Lamar Fleming, Jr. were appointed executors of the estate. The decedent kept his books and made his income tax returns upon the cash receipts and disbursements basis; his income tax returns were rendered on the calendar year basis.

(b) At the time of his death the decedent was a member of the partnership of Anderson, Clayton & Fleming of 60 Beaver Street, New York, N. Y. This partnership was engaged in the business of buying and selling cotton, the handling of foreign exchange and the conducting of financing operations incidental to the cotton business. The annual accounting period of the partnership was a fiscal year [fol. 7] ending July 31 of each calendar year and its books and accounts were kept on the cash receipts and disbursements basis. For income tax purposes, the income of the partnership was computed in accordance with the method of keeping its books and its returns were rendered upon the basis of the fiscal year employed by the partnership.

(c) After the close of its fiscal year ended July 31, 1933, Anderson, Clayton & Fleming filed a partnership return of income showing its net income for the period August 1, 1932 to July 31, 1933, and each partner's share of such income.

(d) The partnership agreement of Anderson, Clayton & Fleming made no provision for termination of its accounting period upon the death of a partner. Following the death of Lamar L. Fleming and until the partnership was liquidated some time during 1934, the business of the partnership was continued by the surviving partners. Early in May, 1934, the surviving partners formed a new partnership pursuant to an agreement dated as of December 18, 1933, and the business of Anderson, Clayton & Fleming was taken over by the new partnership.

(e) On or about January 9, 1934, the executors of the estate of Lamar L. Fleming received a partial distribution

in liquidation of the old partnership. Such distribution consisted of the capital invested by the decedent in the partnership, undistributed earnings (including earnings for the period August 1 to December 16, 1933), and interest on both capital and undistributed earnings to the date of dis- [fol. 8] tribution. On or about February 5, 1934, the executors received a further distribution in liquidation of the parnership amounting to $15,067.39, which consisted of accrued commissions on transactions which had not been completed either at the time of the decedent's death or on February 5, 1934, when such distribution was made.

(f) At no time prior to the decedent's death did he receive any portion of the profits of the partnership for the period between August 1 and December 16, 1933, nor did the representatives of the decedent receive any portion of such profits until January 9 and February 5, 1934, as stated above. The partnership of which the decedent was a member at the time of his death was not liquidated during the calendar year 1933, nor did any taxable year of such partnership terminate during the calendar year 1933 other than the fiscal which year ended July 31, 1933.

(g) On or about March 15, 1934, the executors of the estate of Lamar L. Fleming filed a Federal income tax return covering the period from January 1, 1933, to the date of the decedent's death on December 16, 1933. There was included in such return an amount representing the decedent's distributive share of the income of the partnership of Anderson, Clayton & Fleming for the period August 1, 1932 to July 31, 1933, but such return did not include in income of the decedent any portion of the income of the partnership between August 1, 1933 and the date of the decedent's death. In the estate tax return filed by the executors of the estate of Lamar L. Fleming there was included in the [fol. 9] gross estate the value of the decedent's interest in Anderson, Clayton & Fleming, including the decedent's share of income of the partnership for the period August 1 to December 16, 1933.

Wherefore, the petitioner prays that this Board may hear the proceeding and determine:

1. That none of the income of the partnership of Anderson, Clayton & Fleming between August 1 and December

16, 1933, should be included in the income of the decedent for the period covered by the prior-to-death return filed on decedent's behalf.

2. That no taxable year of such partnership ended between January 1 and December 16, 1933, other than the fiscal year of the partnership ended July 31, 1933.

3. That the only income of such partnership which should be included in the income of the decedent for the period from January 1 to December 16, 1933, is the decedent's share of the income of such partnership for its fiscal year ended July 31, 1933.

4. That there is no deficiency in income taxes of the decedent for the period from January 1 to December 16, 1933;

And for such other relief as to this Board may seem proper.

(Signed) Weston Vernon, Jr., Attorney for Petitioner, 15 Broad Street, New York, N. Y.

[fol. 10] *Duly sworn to by W. C. Bloom. Jurat omitted in printing.*

[fol. 11] EXHIBIT "A" TO PETITION

Copy

IT:AR:A-1. Oct. 25, 1934.
FBN-90D.

Guaranty Trust Company of New York, Executor, Estate of Lamar L. Fleming, Deceased, 140 Broadway, New York, New York.

SIRS:

You are advised that the determination of the income tax liability of Lamar L. Fleming, deceased, for the year 1932 and period from January 1 to December 16, 1933, discloses a deficiency of $39,874.31 for the period January 1 to December 16, 1933 and an overassessment of $1,956.92 for the year 1932, as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from

the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your returns by permitting an [fol. 12] early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, by

(Signed) Chas. T. Russell, Deputy Commissioner.

Enclosures: Statement, Form 874.
FBN/TA-2.

Statement

IT:AR:A-1.
FBN-90-D.

In re Guaranty Trust Company of New York, Executor, Estate of Lamar L. Fleming, Deceased, 140 Broadway, New York, New York

	Income Tax Liability			
Year	Income Tax Liability	Income Tax Assessed	Over assessment	Deficiency
1932	$25,611.34	$27,568.26	$1,956.92	.....
Period January 1 to December 16, 1933	116,254.37	76,380.06	.....	$39,874.31
Total	$141,865.71	$103,948.32	$1,956.92	$39,874.31

[fol. 13] The deficiency shown herein is based upon the report dated July 12, 1934, prepared by Revenue Agent W. C. Baptist, and transmitted to you under date of August 11, 1934.

1932

Net income reported	$116,816.39
Deduct:	
1. Partnership profits	5,000.00
Net income adjusted	$111,816.39

Explanation of Changes

1. Income from the partnership for the period August 1, 1931 to July 31, 1932, of Anderson, Clayton and Fleming, was overstated by $5,000.00. The audit of the partnership return discloses the correct net income to be $306,543.02 and the decedent's share to be $102,190.83 instead of $107,190.83 as reported.

2

Statement

Guaranty Trust Company of New York, Executor
Estate of Lamar L. Fleming, Deceased

Computation of Tax

Net income as adjusted		$111,816.39
Less:		
Taxable at 1931 rates		42,579.51
Net income subject to 1932 rates		$69,236.88
[fol. 14] Less:		
Dividends	$1,587.52	
Personal exemption	1,000.00	
		2,567.52
Balance subject to normal tax		$66,669.36
Normal tax at 4% on $4,000.00		160.00
Normal tax at 8% on $62,669.36		5,013.55
Surtax on $69,236.88		10,215.80
Normal tax at 5% on $42,579.51 (1931 rates)		2,128.98
Surtax (1931 rates) on $42,579.51		8,093.01
Total tax assessable		$25,611.34
Tax previously assessed		27,568.26
Overassessment		$1,956.92

January 1 to December 16, 1933

Net income reported	$181,217.94
Add:	
1. Interest not reported	5,559.19
2. Partnership profits	63,494.46
Net income adjusted	$250,271.59

Statement

Guaranty Trust Company of New York, Executor

Estate of Lamar L. Fleming, Deceased

Interest, Helm note received August 18, 1933	$50.00
[fol. 15] Interest, personal account, Anderson, Clayton and Fleming, credited December 16, 1933	3,209.19
Interest, capital account as of December 16, 1933	2,300.00
Total interest not reported	$5,559.19

2. Partnership profits have been increased by $63,494.46. The report covering an examination of the partnership records for the period August 1, 1932 to July 31, 1933, discloses a net income of $392,850.23 and the decedent's distributable share to be $127,775.72.

The report covering an examination of the partnership records for the period August 1, 1933 to December 16, 1933, discloses a net income of $195,367.56. The decedent's distributable share is $63,494.46, which amount has been added to his taxable income in accordance with the provisions of article 902 of Regulations 77, relating to the Revenue Act of 1932.

Computation of Tax

Net income adjusted		$250,271.59
Add:		
Capital loss		1,101.79
Ordinary income adjusted		$251,373.38
Less:		
Dividends	$1,555.86	
Personal exemption	1,000.00	
		2,555.86
Balance subject to normal tax		$248,817.52
[fol. 16] Normal tax at 4% on $4,000.00		$160.00
Normal tax at 8% on $244,817.52		19,585.40
Surtax on $251,373.38		96,646.69
Total tax		$116,392.09

Statement

Guaranty Trust Company of New York, Executor
Estate of Lamar L. Fleming, Deceased

Brought forward	$116,392.09
Less:	
12½% of capital loss of $1,101.79	137.72
Total tax assessable	$116,254.37
Tax previously assessed	76,380.06
Deficiency	$39,874.31

Due consideration has been given to your request that the income tax liability of the above-named estate be determined at the earliest practicable date.

A copy of this letter, together with a copy of the statement has been mailed to your representative, Mr. Walter D. Fletcher, 15 Broad Street, New York, New York, in accordance with the authority conferred upon him in the power of attorney, executed by you and on file with the Bureau.

FBN/EH-1.

[fol. 17] Before United States Board of Tax Appeals

[Title omitted]

Answer

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, for answer to the petition of this taxpayer, filed January 19, 1935, admits and denies as follows:

1, 2, 3. Admits the averments contained in paragraphs 1, 2, and 3 of the petition.

4. Denies the averments contained in paragraph 4 of the petition.

5. Admits the averments contained in paragraphs 5(a), (b), (c) and (g); for lack of sufficient information upon which to form a belief, denies the remaining averments of

the petition and will require proof thereof upon the hearing of this appeal.

[fol. 18] Wherefore it is prayed that the taxpayer's appeal be denied.

(Signed) Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel: Harold Allen, R. H. Transue, Special Attorneys, Bureau of Internal Revenue.

HA-afh 2-11-35.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto that the following facts are true, reserving, [fol. 19] however, to either party the right to introduce other evidence:

1. Lamar L. Fleming (hereinafter referred to as the decedent), died December 16, 1933. Prior to his death, the books of the decedent were kept on the cash receipts and disbursements basis and the decedent reported his income for Federal income tax purposes upon the same basis. Prior to his death the decedent's income tax returns were made upon the calendar year basis.

2. Under the will of the decedent, Guaranty Trust Company of New York, of 140 Broadway, New York, N. Y. and Lamar Fleming, Jr., of Houston, Texas, were appointed and qualified as executors of the estate of the decedent.

3. Prior to his death the decedent was a member of a partnership known as Anderson, Clayton & Fleming, maintaining its principal office in New York, which was engaged in the business of buying and selling cotton, the handling of foreign exchange and the conducting of financing operations incidental to the cotton business. The partnership of Anderson, Clayton & Fleming was formed in September, 1918, and operated thereafter under successive partnership agreements. As of August 1, 1930, a partnership agreement was executed by the partners of Anderson, Clayton &

Fleming, which continued in force up to and including July 31, 1933. A true copy of such partnership agreement of August 1, 1930 is attached hereto and marked Exhibit A. Upon the admission of William Leland Anderson to the firm [fol. 20] as of August 1, 1933, a partnership agreement was executed, effective as of that date, which was identical in all respects to the agreement of August 1, 1930, except for the division of profits among the partners. A true copy of the partnership agreement executed as of August 1, 1933, is attached hereto and marked Exhibit B.

4. The partnership existing under the agreement of August 1, 1930 kept its books and reported its income to the Treasury Department for income tax purposes upon the cash receipts and disbursements basis. It kept its books and reported its income to the Treasury Department upon the basis of a fiscal year ended July 31 of each year. Upon the termination of the fiscal year of such partnership ended July 31, 1933, and pursuant to the articles of partnership then in effect, the profits of the partnership for the preceding twelve months were computed and the partners were notified of their respective shares of such profits. Part of the profits earned during the fiscal year ended July 31, 1933, belonging to the decedent were not immediately withdrawn by him but were left on deposit with the partnership.

5. The partnership agreement in effect at the time of the decedent's death contained no specific provision as to the method of liquidation in the event of the death of a partner. However, Article Ninth of the partnership articles provided, in part, that:

"In the event of any dissolution of the copartnership under any provision of this agreement or in any manner [fol. 21] or for any cause whatsoever, the assets thereof shall be applied first, to the payment of the debts thereof; second, to the return of the capital invested therein by any partner hereto; and third, to the distribution of the profits or surplus in accordance with the provisions hereinabove set forth for the distribution of net gains and profits."

6. Following the decedent's death on December 16, 1933, the business of the partnership was continued under the same name by the surviving partners. Early in May, 1934, the surviving partners executed a partnership agreement

dated as of December 18, 1933. A true copy of such agreement dated as of December 18, 1933, is attached hereto as Exhibit C.

7. Following the death of the decedent, an audit of the accounts of the partnership was made for the period August 1 to December 16, 1933, inclusive. Such audit was completed on January 30, 1934, and showed net earnings of $154,517.75, after including certain commissions on "open" contracts not received by the partnership on January 30, 1934, amounting to $42,753.05, and after deducting certain losses on the revaluation of partnership investments amounting to $41,241.10, all as more fully set forth in the statement of earnings attached hereto as Exhibit D. The losses on the revaluation of partnership investments were computed as shown on the statement attached hereto as Exhibit E.

[fol. 22] 8. The commissions on "open" accounts of the partnership, amounting to $42,753.05 as of December 16, 1933, were uncollected commissions earned by the partnership upon purchases and sales of cotton for future delivery. Such commissions had not been collected by the partnership at the time of the decedent's death and were not collected until some time during 1934. The Laws of the New York Cotton Exchange in force prior to and since the decedent's death provide that a commission shall be paid upon each 100 bales of cotton bought or sold for future delivery. Such commissions are earned immediately upon the purchase or sale of the future, but the practice of the trade is that no bill is rendered and no commission is paid until the contract entered into has been liquidated. It was not the practice of the partnership to accrue on its books at the end of a fiscal year the commissions due the firm on such "open" transactions.

9. Under the partnership agreement in force at the time of the decedent's death, he was entitled to 32½% of the earnings thereof. The audit of the books of the old partnership showed that the decedent was entitled to profits for the period from August 1 to December 16, 1933, amounting to $50,218.27, or 32½% of $154,517.75, the amount of net profits of the firm for that period, as computed in the attached Exhibit D.

10. The audit of the books of the partnership also showed that the decedent had a credit balance with the firm amount-

ing to $162,795.67, consisting of earnings not withdrawn [fol. 23] from the firm and that the decedent had contributed capital of $100,000 to the firm.

11. Liquidation of the partnership was commenced early in 1934. On or about January 9, the executors of the decedent's estate received from the firm $298,730.10, made up as follows:

(1) 32½% of earnings of the firm between August 1 and December 16, 1933, amounting to $108,156.55 (the latter figure not including any part of the commissions on "open" transactions between August 1 and December 16, 1933)	$35,150.88
(2) Credit balance of the decedent	162,795.67
(3) Capital contributed by the decedent	100,000.00
	$297,946.55
(4) Interest	783.64
	$298,730.19

12. On or about February 5, 1934, the executors were paid the further principal amount of $15,067.39, and interest of $82.58. The amount of $15,067.39 included $13,894.74 as the decedent's 32½% of a total of $42,753.05 commissions on "open" transactions as of December 16, 1933. No part of such commissions were collected by the partnership until some time during 1934.

[fol. 24] 13. Prior to the death of the decedent, no part of the profits of the partnership for the period from August 1 to December 16, 1933, was distributed to the decedent. No portion of such profits was distributed either to the decedent or to his executors during the calendar year 1933.

14. On or about March 15, 1934, the executors of the Estate of Lamar L. Fleming filed the decedent's prior-to-death Federal Income Tax Return for the period January 1, 1933 to December 16, 1933. Such return was filed with the Collector for the Second District of New York at New York City, N. Y. In such return the executors reported the decedent's ordinary net income for this period as $182,319.73, reported a capital loss of $1,101.79, and a tax of $76,380.06 was paid thereon. The income reported by the

executors for the prior-to-death period, included the decedent's distributive share of the income of the partnership of Anderson, Clayton & Fleming for the full twelve months of the fiscal year of the old partnership from August 1, 1932 to July 31, 1933. Such return did not include any portion of the income of the firm for the period August 1 to December 16, 1933, nor was any deduction taken in such return for the losses on revaluation of firm investments shown on Exhibit E attached hereto.

15. By letter dated October 25, 1934, the Commissioner of Internal Revenue notified the petitioner that he had determined a deficiency in tax in the decedent's prior-to-death return of $39,874.31. The Commissioner's notice of [fol. 25] deficiency disclosed that the alleged deficiency arose from the Commissioner's addition to the decedent's income, as reported by the executors, of the amount of $63,494.46, representing "partnership profits" and the amount of $5,559.19, representing "interest not reported".

16. The item of $63,494.46 referred to as "partnership profits" in the notice of deficiency herein, consisted of the decedent's share of uncollected commissions on "open" transactions, and the decedent's share of earnings of the partnership for the period from August 1 to December 16, 1933, after eliminating the losses on revaluation of the partnership investments, set forth in Exhibit E attached hereto.

17. The amount of $5,559.19, referred to in the notice of deficiency herein as "interest not reported", consisted of $3,209.19, representing interest from August 1 to December 16, 1933, upon the credit balance of the decedent with the partnership as of December 16, 1933; the further amount of $2,300, representing interest upon the decedent's capital account with Anderson, Clayton & Fleming for the same period, and $50.00 interest received by the decedent from a source other than the partnership, which amount was omitted from the return. No portion of the interest upon the decedent's credit balance or upon the decedent's capital account for the period from August 1 to December 16, 1933, was credited to the decedent on the books of the partnership prior to his death, nor was such interest received by the executors of the decedent during the calendar year 1933.

[fol. 26] 18. In the prior-to-death income tax return of the decedent for the period January 1 to December 16, 1933,

the decedent's executors deducted the amount of $726.65 as deductible charitable contributions of the decedent. This amount included the amount of $583.65, representing the decedent's pro rata share of donations made by Anderson, Clayton & Fleming for the full fiscal year of the partnership August 1, 1932 to July 31, 1933, and also the further amount of $143.00, representing personal donations made by the decedent for the period January 1 to December 16, 1933. The decedent's executors did not deduct in the decedent's return for the prior-to-death period January 1 to December 16, 1933, the decedent's pro rata share of the charitable donations made by the partnership for the period August 1, 1933 to December 16, 1933. The donations made by Anderson, Clayton & Fleming for such period amounted to $835.50, the decedent's share of which was $271.54. In computing the alleged deficiency in the decedent's taxes for the period from January 1 to December 16, 1933 the Commissioner did not allow the decedent a deduction for the decedent's share of charitable contributions made by the old partnership for the period from August 1 to December 16, 1933.

19. In the Federal estate tax return filed by the executors of the estate of Lamar L. Fleming, there was included in the gross estate the decedent's interest in the firm of Anderson, Clayton & Fleming at a fair market value as of the date of death of $313,013.94, computed as follows:

(1) Credit balance of the decedent with the firm [fol. 27]	$162,795.67
(2) Capital contributed to the firm by the decedent	100,000.00
(3) The decedent's share of net earnings of the partnership for the period from August 1 to December 16, 1933	50,218.27
	$313,013.94

Item (3) above, amounting to $50,218.27, was 32½%, or the decedent's proportionate share of the earnings of the old partnership for the period from August 1 to December 16, 1933, as shown on the statement of earnings attached hereto as Exhibit D. Upon the audit of the Federal estate tax return so filed by the executors of the decedent's estate, the value of the decedent's interest in the firm of

Anderson, Clayton & Fleming as reported in such return was accepted and the tax was paid.

20. On October 14, 1933, there was filed with the Collector of Internal Revenue for the Second District of New York, on the form provided by the Treasury Department therefor, a partnership return of income for Anderson, Clayton & Fleming for the fiscal year of the partnership begun August 1, 1932 and ended July 31, 1933.

21. On February 28, 1934, there was filed with the Collector of Internal Revenue for the Second District of New York, on the form provided by the Treasury Department [fol. 28] therefor, a return stated to be on behalf of "Anderson, Clayton & Fleming in Liquidation". Such return was signed and sworn to by William H. Koar, and was designated "Partnership Return of Income. For Fiscal Year 1933. Fiscal Year Begun August 1, 1933 and ended 12/16/33". No permission was obtained from the Commissioner of Internal Revenue to file such return.

22. On October 28, 1934, there was filed with the Collector of Internal Revenue for the Second District of New York, on the form provided by the Treasury Department therefor, a return on behalf of "Anderson, Clayton & Fleming". Such return was signed by William H. Koar and was designated "Partnership Return of Income. For Fiscal Year 1934. Fiscal Year Begun December 17, 1933 and ended July 31, 1934".

23. On or about March 5, 1935, the executors of the estate of the decedent waived the restrictions upon the assessment of $37,917.39, out of a total deficiency in tax determined by the Commissioner in his letter of October 25, 1934, amounting to $39,874.31. Such waiver was made after the petition to the Board of Tax Appeals had been filed herein, and was made without prejudice to the right of the executors to prosecute the pending appeal and to recover any amount refundable under the final decision of the Board herein. Following the waiver of the restrictions upon the assessment of $37,917.39, the Commissioner assessed such amount against the executors of the decedent, [fol. 29] together with interest thereon in the amount of $2,318.67, making a total of $40,236.06. The Commissioner applied as a credit against such taxes and interest the amount of an over-assessment in the decedent's income tax

for the calendar year 1932, amounting to $1,956.92, together with interest thereon amounting to $149.02, and issued a notice and demand upon the decedent's estate for a total of $38,130.12, consisting of $35,811.45 in tax and interest of $2,318.67, totaling $38,130.12, which was paid by the decedent's executors on April 15, 1935.

Weston Vernon, Jr., Counsel for the Petitioner.
(Sgd.) Robert H. Jackson, Counsel for the Respondent.

Dated Nov. 11, 1935.

[fol. 30] EXHIBIT "A"

This Agreement made and entered into by and between and among Monroe D. Anderson of Houston, Texas, party of the first part, William L. Clayton of Houston, Texas, party of the second part, Lamar L. Fleming of New York, New York, party of the third part, Lamar Fleming, Junior, of Houston, Texas, party of the fourth part, Dudley B. Cannafax of Houston, Texas, party of the fifth part, William J. Jung of Brooklyn, New York, party of the sixth part, Harmon Whittington of Houston, Texas, party of the seventh part, William H. Koar of Hawthorne, New Jersey, party of the eighth part, and Anderson, Clayton & Co., a Joint Stock Association of Houston, Texas, party of the ninth part:

Witnesseth, That

Whereas the parties hereto desire and have agreed to associate themselves together as co-partners in a general co-partnership in business, for the purposes and upon the terms and conditions hereinafter mentioned;

Now, Therefore, the parties hereto in consideration of the premises and of the mutual promises and agreements of each other do hereby mutually covenant and agree to and do hereby associate themselves together as a co-partnership to engage in general business for the purposes and subject to the terms, conditions and provisions hereinafter mentioned, that is to say:

[fol. 31] First. The firm name of the said co-partnership shall be Anderson, Clayton & Fleming, and its principal office for the transaction of its business shall be in the City of New York, State of New York.

Second. The business to be transacted by the said co-partnership shall be a general business and the buying and selling, forwarding and shipping of cotton, and the handling of foreign exchange and the conducting of all financing or other operations which may be incidental to the purchase, sale, handling and shipping of cotton, for this firm or as agents or representatives of other persons or firms.

Third. The co-partnership hereunder shall commence as of August 1st, 1930, and shall continue until July 31st, 1931, (hereinafter sometimes called "the fiscal year"), and shall be deemed to have been continued and extended from year to year thereafter, unless any one of the parties hereto shall give notice in writing, not less than thirty days prior to July 31st of any year, of intention to terminate this contract of partnership upon July 31st of such year, provided, however, the parties may dissolve said partnership by mutual consent at any time.

Fourth. The capital which shall be contributed by the several partners at the beginning of the term may be added to or increased at any time during the term. Any such additional amount so contributed by any partner may be drawn out at the end of the fiscal year in which such addi-
[fol. 32] tional contribution is made or at any time after, but the original contributions to capital shall remain in the business throughout the term of the co-partnership except as herein otherwise provided. All capital shall bear interest at the rate of six per centum (6%) per annum, or at such other rate as mutually may be agreed upon between the partners, which interest shall be credited or paid at the end of each fiscal year during the continuance of the co-partnership and shall be charged to the expenses of the business.

The said Lamar L. Fleming shall contribute to the capital of the co-partnership the sum of One Hundred Thousand ($100,000.00) Dollars in cash, and the said Anderson, Clayton & Co., shall contribute to the capital of the co-partnership the sum of Two Hundred Thousand ($200,-000.00) Dollars in cash, and neither the said Lamar L. Fleming or said Anderson, Clayton & Co. shall withdraw capital below the sum of Three Hundred Thousand ($300,-000.00) Dollars without the consent of all the partners. The said Anderson, Clayton & Co. does further agree to

furnish any additional capital required for the conduct of the affairs of the partnership over and above the Three Hundred Thousand ($300,000.00) Dollars provided as above set forth.

Fifth. At all times during the continuance of said co-partnership the said Lamar L. Fleming, William J. Jung and William H. Koar shall devote their best skill and energy for the purpose of conducting the business of said co-partnership, with said Lamar L. Fleming in charge of the [fol. 33] general management thereof. The remaining partners shall give such time and attention to the business of the partnership as it may require.

Sixth. At the end of each fiscal year during the continuance of this co-partnership, for the purpose of ascertaining the net gains and profits for the preceding year, a general account shall be taken and stated by the partners of all the moneys, claims, assets, property and interest of every kind and nature whatsoever, and of all accounts due and owing to said co-partnership and also of all liabilities, actual or contingent, and of all other matters and things which are usually included in accounts of such nature, and in making up said account, all expenses including interest upon loans and upon capital, taxes, and all losses for the preceding year, and all losses for any preceding years which shall not have been sufficiently provided for, and all bad or doubtful debts or accounts, shall be charged off and deducted from earnings; and such reserves shall be set up and deducted for outstanding liabilities, liquidated, contingent or deferred, or otherwise as a majority of the partners may deem proper. The net gains and profits so ascertained shall, within a reasonable period after the end of each fiscal year, be distributed among the co-partners as follows:

(1) 17.7855% shall be paid to Monroe D. Anderson,

(2) 23.4072% shall be paid to William L. Clayton,

[fol. 34] (3) 33.3333% shall be paid to Lamar L. Fleming,

(4) 8.0317% shall be paid to Lamar Fleming, Junior,

(5) 2.0% shall be paid to Dudley B. Cannafax,

(6) 7.0% shall be paid to William J. Jung,

(7) 3.4423% shall be paid to Harmon Whittington,

(8) 5.0% shall be paid to William H. Koar, Provided, however, that William J. Jung shall receive seven per centum (7%) of the net gains and profits or the sum of Twenty-Five Thousand ($25,000) Dollars, whichever amount is greater, and William H. Koar shall receive the said five per centum (5%) of the net gains and profits or the sum of Twelve Thousand Five Hundred ($12,500) Dollars, whichever amount is greater,

and provided further that if the net gains and profits for any one fiscal year are less than or equal to Thirty-Seven Thousand Five Hundred ($37,500) Dollars, then in that event all of such net gains and profits are to be divided two-thirds to William J. Jung and one-third to William H. Koar.

and still further provided that if twelve per centum (12%) of the said net gains and profits are less than Thirty-seven Thousand Five Hundred ($37,500) Dollars, then in that [fol. 35] event the participation of the partners other than William J. Jung and William H. Koar shall be reduced proportionately to the extent that the sum of Thirty-Seven Thousand Five Hundred ($37,500) Dollars exceeds twelve per centum (12%) of the said net gains and profits.

In case of a net loss for any fiscal year, such net loss shall be borne by the said co-partners in the same proportion of their respective percentages of participation in the net gains and profits.

Seventh. There shall be kept, at all times during the continuance of the co-partnership, just, accurate and true books of account, wherein shall be set down all moneys received for the purpose and benefit of said co-partnership, and all moneys paid, laid out and expended in and about the said business, and also all goods, wares, commodities and merchandise bought or sold by reason of or on account of the said business, and all other matters and things whatsoever to the said business and the management thereof in any wise belonging, which said books shall be used in common between the said co-partners so that any of them may have access thereto without interruption or hindrance by any of the others. The firm name shall not be used by any partner or partners for endorsement upon any checks,

promissory notes, bills of exchange, acceptances or other evidences of indebtedness, for use in or in connection with any transaction, business or contract outside of the regular business of the firm.

[fol. 36] Eighth. During the existence and continuance of the said co-partnership none of the partners shall engage in any speculation of any kind whatsoever, in cotton or any other commodities, with the funds or credit of the said co-partnership or which in any way involves, or may involve, its assets. In the event any of the said partners shall violate the provisions of this paragraph, the same shall constitute good and sufficient ground for any of the other partners to terminate the co-partnership agreement forthwith upon not less than thirty days written notice signed by all the other partners and served upon such partner.

Ninth. In the event of any dissolution of the co-partnership under any provision of this agreement or in any manner or for any cause whatsoever, the assets thereof shall be applied first, to the payment of the debts thereof; second, to the return of the capital invested therein by any partner hereto; and third, to the distribution of the profits or surplus in accordance with the provisions hereinabove set forth for the distribution of net gains and profits. It is further understood and agreed that as to any one of the parties hereto, his interest in the firm shall be in accordance with this agreement and not otherwise, and that nothing whatsoever shall be paid to the estate of any deceased partner for good-will; any claim or right of each partner to have his estate participate in the good-will of said business in the event of his death is hereby expressly waived and surrendered.

[fol. 37] In Witness Whereof, the parties hereto have executed this agreement as of the first day of August, 1930:

Witness:

C. A. Couch, G. M. Cline, E. M. Kronberg, A. Bryan, Leah Hughes, E. M. Kronberg, R. Vinson, A. O'Donnell, C. A. Couch, Monroe D. Anderson, W. L. Clayton, L. L. Fleming, Lamar Fleming, Jr., Dudley B. Cannafax, William J. Jung, Harmon Whittington, W. H. Koar, Anderson, Clayton & Co., by M. D. Anderson, W. L. Clayton, Managing Director.

[fol. 38] EXHIBIT "B"

Anderson, Clayton & Fleming

Partnership Agreement, August 1, 1933

"This Agreement made and entered into by and between and among Monroe D. Anderson of Houston, Texas, party of the first part, William L. Clayton of Houston, Texas, party of the second part, Lamar L. Fleming of New York, New York, party of the third part, Lamar Fleming, Junior, of Houston, Texas, party of the fourth party, Harmon Whittington of Houston, Texas, party of the fifth part, Dudley B. Cannafax of Houston, Texas, party of the sixth part, William J. Jung of Brooklyn, New York, party of the seventh part, William H. Koar of Glen Rock, New Jersey, party of the eighth part, William Leland Anderson of New York, New York, party of the ninth part, and Anderson Clayton & Co., a Joint Stock Association of Houston, Texas, party of the tenth part:

Witnesseth, That

Whereas the parties hereto desire and have agreed to associate themselves together as co-partners in a general co-partnership in business, for the purposes and upon the terms and conditions hereinafter mentioned;

Now, Therefore, the parties hereto in consideration of the premises and of the mutual promises and agreements of each other do hereby mutually covenant and agree to [fol. 39] and do hereby associate themselves together as a co-partnership to engage in general business for the purpose and subject to the terms, conditions and provisions hereinafter mentioned, that is to say:

First. The firm name of the said co-partnership shall be Anderson, Clayton & Fleming, and its principal office for the transaction of its business shall be in the City of New York, State of New York.

Second. The business to be transacted by the said co-partnership shall be a general business and the buying and selling, forwarding and shipping of cotton, and the handling of foreign exchange and the conducting of all financing or other operations which may be incidental to the purchase, sale, handling and shipping of cotton, for this firm or as agents or representatives of other persons or firms.

Third. The co-partnership hereunder shall commence as of August 1, 1933, and shall continue until July 31, 1934, (hereinafter sometimes called "the fiscal year"), and shall be deemed to have been continued and extended from year to year thereafter, unless any one of the parties hereto shall give notice in writing, not less than thirty days prior to July 31st of any year, of intention to terminate this contract of partnership upon July 31st of such year, provided, however, the parties may dissolve said partnership by mutual consent at any time.

[fol. 40] Fourth. The capital which shall be contributed by the several partners at the beginning of the term may be added to or increased at any time during the term. Any such additional amount so contributed by any partner may be drawn out at the end of the fiscal year in which such additional contribution is made or at any time after, but the original contributions to capital shall remain in the business throughout the term of the co-partnership except as herein otherwise provided. All capital shall bear interest at the rate of six per centum (6%) per annum, or at such other rate as mutually may be agreed upon between the partners, which interest shall be credited or paid at the end of each fiscal year during the continuance of the co-partnership and shall be charged to the expenses of the business.

The said Lamar L. Fleming shall contribute to the capital of the co-partnership the sum of One Hundred Thousand ($100,000.00) Dollars in cash, and the said Anderson, Clayton & Co., shall contribute to the capital of the co-partnership the sum of Two Hundred Thousand ($200,000.00) Dollars in cash, and neither the said Lamar L. Fleming nor said Anderson, Clayton & Co. shall withdraw capital below the sum of Three Hundred Thousand ($300,000.00) Dollars without the consent of all the partners. The said Anderson, Clayton & Co. does further agree to furnish any additional capital required for the conduct of the affairs of the partnership over and above the Three Hundred Thousand ($300,000.00) Dollars provided as above set forth.

Fifth. At all times during the continuance of said co-
[fol. 41] partnership the said Lamar L. Fleming, William J. Jung, William H. Koar, and William Leland Anderson shall devote their best skill and energy for the purpose of conducting the business of said co-partnership, with said

Lamar L. Fleming in charge of the general management thereof. The remaining partners shall give such time and attention to the business of the partnership as it may require.

Sixth. At the end of each fiscal year during the continuance of this co-partnership, for the purpose of ascertaining the net gains and profits for the preceding year, a general account shall be taken and stated by the partners of all the moneys, claims, assets, property and interest of every kind and nature whatsoever, and of all accounts due and owing to said co-partnership and also of all liabilities, actual or contingent, and of all other matters and things which are usually included in accounts of such nature, and in making up said account, all expenses including interest upon loans and upon capital, taxes, and all losses for the preceding year, and all losses for any preceding years which shall not have been sufficiently provided for, and all bad or doubtful debts or accounts shall be charged off and deducted from earnings; and such reserves shall be set up and deducted for outstanding liabilities, liquidated, contingent or deferred, or otherwise as a majority of the partners may deem proper. The net gains and profits so ascertained shall, within a reasonable period after the end of each fiscal year, be distributed among the co-partners as follows:

[fol. 42] (1) 15½% shall be paid to Monroe D. Anderson,

(2) 20½% shall be paid to William L. Clayton,

(3) 32½% shall be paid to Lamar L. Fleming,

(4) 7% shall be paid to Lamar Fleming, Jr.,

(5) 3½% shall be paid to Harmon Whittington,

(6) 2% shall be paid to Dudley B. Cannafax,

(7) 7% shall be paid to William J. Jung,

(8) 7% shall be paid to William H. Koar,

(9) 5% shall be paid to William Leland Anderson.

Provided, however, that William J. Jung and William H. Koar shall receive seven per centum (7%) each of the net gains and profits, or the sum of Twenty-five Thousand Dollars ($25,000.00) each, whichever amount is greater,

and provided further that if the net gains and profits for any one fiscal year are less than or equal to Fifty Thousand Dollars ($50,000.00), then in that event all of such net

gains and profits shall be divided equally between William J. Jung and William H. Koar,

and still further provided that if fourteen per centum (14%) [fol. 43] of the said net gains and profits are less than Fifty Thousand Dollars ($50,000.00), then in that event the participation of the partners other than William J. Jung and William H. Koar shall be reduced proportionately to the extent that the sum of Fifty Thousand Dollars ($50,000.00) exceeds fourteen per centum (14%) of the said net gains and profits.

In the event of a net loss for any fiscal year, such net loss shall be borne by the said co-partners in the same proportion of their respective percentages of participation in the net gains and profits.

Seventh. There shall be kept, at all times during the continuance of the co-partnership, just, accurate and true books of account, wherein shall be set down all moneys received for the purpose and benefit of said co-partnership, and all moneys paid, laid out and expended in and about the said business, and also all goods, wares, commodities and merchandise bought or sold by reason of or on account of the said business, and all other matters and things whatsoever to the said business and the management thereof in any wise belonging, which said books shall be used in common between the said co-partners so that any of them may have access thereto without interruption or hindrance by any of the others. The firm name shall not be used by any partner or partners for endorsement upon any checks, promissory notes, bills of exchange, acceptances or other evidences of indebtedness, for use in or in connection with any transac- [fol. 44] tion, business or contract outside of the regular business of the firm.

Eighth. During the existence and continuance of the said co-partnership none of the partners shall engage in any speculation of any kind whatsoever, in cotton or any other commodities, with the funds or credit of the said co-partnership or which in any way involves, or may involve, its assets. In the event any of the said partners shall violate the provisions of this paragraph, the same shall constitute good and sufficient ground for any of the other partners to terminate the co-partnership agreement forthwith upon not less than

thirty days written notice signed by all the other partners and served upon such partner.

Ninth. In the event of any dissolution of the co-partnership under any provision of this agreement or in any manner or for any cause whatsoever, the assets thereof shall be applied first, to the payment of the debts thereof; second, to the return of the capital invested therein by any partner hereto; and third, to the distribution of the profits or surplus in accordance with the provisions hereinabove set forth for the distribution of net gains and profits. It is further understood and agreed that as to any one of the parties hereto, his interest in the firm shall be in accordance with this agreement and not otherwise, and that nothing whatsoever shall be paid to the estate of any deceased partner for good-will; any claim or right of each partner to have his estate participate in the good-will of said business in the event of his death is hereby expressly waived and surrendered.

[fol. 45] In Witness Whereof, the parties hereto have executed this agreement as of the first day of August, 1933:"

Witness:

C. A. Couch, G. M. Cline, A. O'Donnell, A. Bryan, L. Faris, N. DeMoin, A. O'Donnell, A. O'Donnell, A. O'Donnell, C. A. Couch, M. D. Anderson, W. L. Clayton, L. L. Fleming, Lamar L. Fleming, Jr., H. Whittington, D. B. Cannafax, William J. Jung, W. H. Koar, Wm. Leland Anderson, Anderson, Clayton & Co., by M. D. Anderson, W. L. Clayton.

[fol. 46] EXHIBIT "C"

This Agreement dated as of the 18th day of December, 1933, by and between and among Monroe D. Anderson, of Houston, Texas, Party of the first part, William L. Clayton, of Houston, Texas, party of the second part, Lamar Fleming, of Houston, Texas, party of the third part, Harmon Whittington, of Houston, Texas, party of the fourth part, Dudley B. Cannafax, of Houston, Texas, party of the fifth part, William J. Jung, of Great Neck, L. I., New York, party of the sixth part, William H. Koar, of Glen Rock, New Jersey, party of the seventh part, William Leland Anderson, of Houston, Texas, party of the eighth part, and Anderson,

Clayton & Co., a Joint Stock Association, of Houston, Texas, party of the ninth part:

Witnesseth That:

Whereas the parties hereto desire and have agreed to associate themselves together as co-partners in a general co-partnership in business, for the purposes and upon the terms and conditions hereinafter mentioned;

Now, Therefore, the parties hereto in consideration of the premises and of the mutual promises and agreements of each other do hereby mutually covenant and agree to and do hereby associate themselves together as a co-partnership to engage in general business for the purposes and subject to the terms, conditions and provisions hereinafter mentioned, that is to say:

[fol. 47] First. The firm name of the said co-partnership shall be Anderson Clayton & Fleming, and its principal office for the transaction of its business shall be in the City of New York, State of New York.

Second. The business to be transacted by the said co-partnership shall be a general business and the buying and selling, forwarding and shipping of cotton, and the handling of foreign exchange and the conducting of all financing or other operations which may be incidental to the purchase, sale, handling and shipping of cotton, for this firm or as agents or representatives of other persons or firms.

Third. The co-partnership hereunder shall commence as of December 18, 1933, and shall continue until July 31, 1934, and shall be deemed to have been continued and extended from year to year thereafter, unless any one of the parties hereto shall give notice in writing, not less than thirty days prior to July 31st of any year, of intention to terminate this contract of partnership upon July 31st of such year, provided, however, the parties may dissolve said partnership by mutual consent at any time. The co-partnership shall operate on a fiscal year ending July 31st each year.

Fourth. The co-partnership will acquire the business and assets of the firm of Anderson, Clayton & Fleming formed pursuant to agreement dated August 1, 1933, and dissolved as a result of the death of Lamar L. Fleming on December

16, 1933, subject to the liabilities of said firm including (a) the liability of said firm to the estate of Lamar L. Fleming [fol. 48] on account of his proportion of the capital and net earnings of said firm and on account of his personal account with said firm, and (b) the liability of said firm to Anderson, Clayton & Co. on account of its proportion of the capital and net earnings of said firm, and (c) the liability of said firm to the other partners of said firm on account of their proportion of net earnings of said firm and on account of their personal accounts with said firm.

The initial capital of the new co-partnership shall be the sum of $100,000 to be contributed by Anderson, Clayton & Co. out of the liability to Anderson, Clayton & Co. on account of its capital interest in the old firm. Anderson, Clayton & Co. agrees to the transfer to the new co-partnership of such $100,000 of its capital interest in the old firm and agrees not to withdraw any of such capital of $100,000 without the consent of all the partners of the new co-partnership.

The several partners may make contributions of additional capital to the co-partnership at any time during the term of the co-partnership. Any such additional amount so contributed by any partner may be drawn out at the end of the fiscal year in which such additional contribution is made or at any time thereafter.

All capital shall bear interest at the rate of five per cent per annum, or at such other rate as may be mutually agreed upon between the partners, which interest shall be credited or paid at the end of each fiscal year during the term of the co-partnership and shall be charged to the expenses of the business.

[fol. 49] Fifth. At all the times during the continuance of said co-partnership, the said William J. Jung, William H. Koar and William Leland Anderson shall devote their best skill and energy for the purpose of conducting the business of said co-partnership. The remaining partners shall give such time and attention to the business of the partnership as it may require.

Sixth. At the end of each fiscal year during the continuance of this co-partnership, for the purpose of ascertaining the net gains and profits for such fiscal year, a general account shall be taken and stated by the partners of all the moneys, claims, assets, property and interest of

every kind and nature whatsoever, and of all accounts due and owing to said co-partnership and also of all liabilities, actual or contingent, and of all other matters and things which are usually included in accounts of such nature, and in making up said account, all expenses including interest upon any loans and upon any capital, taxes, and all losses during such fiscal year, and all losses for any preceding years which shall not have been sufficiently provided for, and all bad or doubtful debts or accounts, shall be charged off and deducted from earnings; and such reserves shall be set up and deducted from earnings as a majority of the partners may deem proper. The net gains and profits so ascertained shall, within a reasonable period after the end of each fiscal year, be distributed among the co-partners as follows:

(1) 14 % shall be paid to Monroe D. Anderson,

[fol. 50] (2) 19 % shall be paid to William L. Clayton,

(3) 14 % shall be paid to Lamar Fleming,

(4) 10 % shall be paid to Harmon Whittington,

(5) 10 % shall be paid to Dudley B. Cannafax,

(6) 12-½%, or the sum of Twenty-Five Thousand Dollars ($25,000.00), whichever amount is greater, shall be paid to William J. Jung.

(7) 12-½%, or the sum of Twenty-five Thousand Dollars ($25,000.00), whichever amount is greater, shall be paid to William H. Koar,

(8) 8 %, or the sum of Sixteen Thousand Dollars, ($16,000.00), whichever amount is greater, shall be paid to William Leland Anderson.

Provided, however, that should the amount of net gains and profits for any one fiscal year be less than or equal to Sixty-six Thousand Dollars ($66,000.00), then such amount shall be distributed among William J. Jung, William H. Koar and William Leland Anderson in the ratio that their respective percentages bear to the total of their percentages; or

[fol. 51] Should 33% of the amount of net gains and profits for any one fiscal year be less than Sixty-six Thousand Dollars ($66,000.00), then the amount of such total net gains and profits in excess of Sixty-six Thousand Dollars ($66,000.00) shall be distributed among Monroe D.

Anderson, William L. Clayton, Lamar Fleming, Harmon Whittington and Dudley B. Cannafax in the ratio that their respective percentages bears to the total of their percentages.

In the event of a net loss for any fiscal year, such loss shall be borne by the said co-partners in the same proportion as their respective percentages of participation in the net gains and profits.

Seventh. In case of the death or retirement of any partner at any time other than at the end of a fiscal year, the net gains and profits or net losses for such part of such fiscal year as shall have elapsed up to date of such death or retirement shall be determined as soon as practicable by a majority of the remaining partners in the manner set forth in Article Sixth of this Agreement in respect of the determination of net gains and profits at the end of a fiscal year. The amount of such deceased or retired partner's interest in the partnership shall then be determined by a majority of the remaining members of the partnership, taking into account the amount of such deceased or retired partner's capital in the partnership, the amount of such deceased or retired partner's interest in net gains and [fol. 52] profits or net losses determined as above provided, and the amount of any credit or debit accounts between such deceased or retired partner and the partnership. Such determination of the amount of such deceased or retired partner's interest shall be final and conclusive and shall be binding upon any such deceased or retired partner and their respective executors, administrators, successors or assigns. The amount of any such deceased or retired partner's interest so determined shall be paid to any such retired partner or to the legal representatives of any such deceased partner with interest on such amount at the rate of five per cent. per annum from the date of retirement or death to the date of payment. If any such determination shows that any such deceased or retired partner has a net indebtedness to the partnership, such indebtedness shall be paid to the partnership with interest on such indebtedness at the rate of five per cent. per annum from the date of retirement or death to the date of payment. It is understood and agreed that any partner's interest in the firm shall be determined in accordance with this Agreement and not otherwise and that nothing whatsoever shall be added or calculated or paid to the estate of any deceased partner

or to any retired partner for good will and any claim or right of any partner to participate or to have his estate participate in the good will of the business in the event of his death or retirement is hereby expressly waived and surrendered.

Eighth. There shall be kept, at all times during the continuance of the co-partnership, just, accurate and true books [fol. 53] of account, wherein shall be set down all moneys received for the purpose and benefit of said co-partnership, and all moneys paid, laid out and expended in and about the said business, and also all goods, wares, commodities and merchandise bought or sold by reason of or on account of the said business, and all other matters and things whatsoever to the said business and the management thereof in any wise belonging, which said books shall be used in common between the said co-partners so that any of them may have access thereto without interruption or hindrance by any of the others. The firm name shall not be used by any partner or partners for endorsement upon any checks, promissory notes, bills of exchange, acceptances or other evidences of indebtedness, for use in or in connection with any transaction, business or contract outside of the regular business of the firm.

Ninth. During the existence and continuance of the said co-partnership none of the partners shall engage in any speculation of any kind whatsoever, in cotton or any other commodities or otherwise, with the funds or credit of the said co-partnership or which in any way involves, or may involve, its assets. In the event any of the said partners shall violate the provisions of this paragraph, the same shall constitute good and sufficient ground for any of the other partners to terminate the co-partnership agreement forthwith upon not less than thirty days' written notice signed by all the other partners and served upon such partner.

[fol. 54] Tenth. In the event of any dissolution of the co-partnership under any provision of this agreement or in any manner or for any cause whatsoever, the assets thereof shall be applied first, to the payment of the debts and liabilities thereof; second, to the return of the capital invested therein by any partner hereto and any accrued and unpaid interest on such capital; and third, to the distribution of the profits or surplus in accordance with the provisions hereinabove set forth for the distribution of net gains and profits.

In Witness Whereof, the parties hereto have executed this agreement as of the 18th day of December, 1933.

M. D. Anderson. W. L. Clayton. Lamar Fleming. H. Whittington. D. B. Cannafax. William J. Jung. W. H. Koar. W. Leland Anderson. Anderson, Clayton & Co.

[fol. 55] EXHIBIT "D"

Anderson, Clayton & Fleming

Statement of Earnings

For the Period August 1 to December 16, 1933, Inclusive

Gross Income:		
Commissions on futures	$325,983.64	
Banking commissions	26,100.00	
Brokerage earned	19,479.00	
Commissions, forwarding and handling	3,824.40	
		$375,387.04
Expenses:		
Salaries	$27,582.50	
Commissions to outside brokers	119,475.00	
Cotton brokerage	36,318.00	
Telephone, telegraph and cable	11,010.51	
Tax on futures	7,796.30	
Clearing house expense	1,279.16	
Dues and assessments	2,125.00	
Rent	4,087.53	
Stationery and office supplies	1,322.10	
Donations	835.50	
Postage	703.95	
Advertising	604.86	
News	595.00	
Miscellaneous taxes	456.59	
Depreciation, furniture and fixtures	620.09	
Bad debts, less recoveries	*85.06*	
Miscellaneous expenses	1,910.62	
		216,637.65
		$158,749.39

[fol. 56] Deduct—Miscellaneous Charges (Net):

Interest paid:		
On personal accounts	$3,895.70	
On capital	6,900.00	
	$10,795.70	
Less—Interest received	5,614.61	
	$5,181.09	
Adjustment of "spot" commissions, prior year	562.50	
		5,743.59
Profit, before commissions on open contracts and losses on revaluation of investments		$153,005.80
Add—Commissions Accrued on Open Contracts		42,753.05
		$195,758.85
Deduct—Losses on Revaluation of Investments		41,241.10
Net Earnings for the Period, carried to Balance Sheet		$154,517.75

[fol. 57] EXHIBIT "E"

Anderson, Clayton & Fleming
Schedule of Investments—December 16, 1933

	Cost	Book Value at Market	Loss on Revaluation
Marketable Securities Deposited with New York Cotton Exchange Clearing Association, Inc.:			
U. S. Treasury Notes, Series C, 2 7/8's, due April 15, 1947 (par value $40,000.00)	$40,675.00	$39,850.00	$825.00
U. S. Treasury Bonds, 3 3/8's, due June 15, 1947 (par value $50,000.00)	50,875.00	49,500.00	1,375.00
Total, carried to Balance Sheet	$91,550.00	$89,350.00	$2,200.00

EXHIBIT "E"—Continued

Anderson, Clayton & Fleming
Schedule of Investments—December 16, 1933

	Cost	Book Value at Market	Loss on Revaluation
Miscellaneous Stocks and Bonds:			
Cosgrove-Meehan Coal Corporation Gold Bonds, 1945, 6-1/2's (par value $35,000.00)	$17,587.50	$1,429.75	$16,157.75
Suburban Light & Power Company 100 shares, First Preferred Stock			
Middlewest Utilities, 156 shares, Common Stock	3,267.00	83.65	3,183.35
Total, carried to Balance Sheet	$20,854.50	$1,513.40	$19,341.10
[fol. 58] New York Cotton Exchange Memberships:			
In name of:			
L. L. Fleming	$17,000.00	$18,000.00	*$1,000.00*
Wm. J. Jung	35,000.00	18,000.00	17,000.00
Leland Anderson	21,700.00	18,000.00	3,700.00
Total, carried to Balance Sheet	$73,700.00	$54,000.00	$19,700.00
Total loss on revaluation			$41,241.10

[fol. 59] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

SUPPLEMENTAL STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto that the following facts are true, reserving, however, to either party the right to introduce other evidence:

(a) The following letter accompanied the return filed on February 28, 1934 on behalf of "Anderson, Clayton & Fleming in Liquidation" (referred to in paragraph 21 of the Stipulation of Facts and Exhibits herein):

"Letterhead of Anderson, Clayton & Fleming, 60 Beaver Street, New York

Anderson, Clayton & Co., Oklahoma City, Houston, Savannah, Atlanta, New Orleans, Boston

[fol. 60] New York, N. Y., February 27, 1934.

Collector of Internal Revenue, Custom House, New York, N. Y.

DEAR SIR:

This partnership has a fiscal year ending July 31 and as customary filed their Annual Partnership Return on October 13, 1933. On December 16, 1933, our Senior Resident Partner, Mr. Lamar L. Fleming, died, causing the dissolution of the partnership. It was subsequently agreed among the surviving partners that a new partnership should be formed as of December 18, 1933, to purchase from the partnership in liquidation its assets and liabilities as of December 16, 1933.

Accordingly, we are enclosing Partnership Return this 27th day of February 1934, which is within two and one-half months of the date of dissolution of the firm, December 16, 1933.

Very truly yours, (Signed) Anderson Clayton & Fleming, W. H. Koar, Partner."

WHK/D.
Enclosure.

[fol. 61] (b) In the return filed on behalf of "Anderson, Clayton & Fleming in Liquidation" on February 28, 1934, there was deducted a loss of $4,525.00 from the sale of stocks and bonds held for less than two years in arriving at the net income of the partnership. In addition, such return showed, under the heading "Partners' or Members' shares of Income and Credits", capital losses aggregating $36,716.10, of which the decedent's share was shown to be $11,932.73. The ordinary loss of $4,525.00 and the capital loss of $36,716.10 claimed in the return made up the loss of $41,241.10 on revaluation of firm securities, shown on Exhibit E attached to the Stipulation of Facts and Exhibits herein.

(c) In auditing the return filed on behalf of "Anderson, Clayton & Fleming in Liquidation" on February 28, 1934, and the returns of the individual partners for the calendar year 1933, the Commissioner disallowed the losses of $41,241.10 and increased the income of the partnership by that amount. The ground of this action as stated in the examining agent's report upon the audit of the partnership return was as follows:

"Loss of $41,241.10 as claimed on sale of securities has been disallowed as examination discloses no sales made, and loss as claimed represented the difference between the original cost and market value as of 12/16/33."

(Sgd.) Weston Vernon Jr., Counsel for Petitioner.

(Sgd.) Robert H. Jackson, Counsel for Respondent.

Dated: Nov. 11, 1935.

[fol. 62] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 78362. Promulgated April 21, 1936

GUARANTY TRUST COMPANY OF NEW YORK, Executor, Estate of Lamar L. Fleming, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent,

Findings of Fact and Opinion

1. Decedent, until his death on December 16, 1933, was a member of a New York partnership. Both decedent and the partnership were on the cash receipts and disbursements basis. Decedent reported his income on a calendar year basis and the partnership, on that of a fiscal year ending July 31, 1933. The partnership contract provided for only one accounting period, which was at the close of its fiscal year. Decedent died December 16, 1933. Under a provision of the partnership contract, the surviving partners continued the firm for the purposes of liquidation, which was completed during 1934. Held, only the distributive share of the profits of the partnership for its fiscal year ended July 31, 1933, is includable in decedent's taxable income for the period January 1, to December 16, 1933. Abe De Roy et al., Executors, 19 B. T. A. 452; R. W. Archbald, Jr., et al., Executors, 4 B. T. A. 483, followed.

[fol. 63] 2. Id.—Commissions earned by such partnership between the end of its fiscal year and decedent's death, but not collected by the partnership nor received by or available to decedent prior to his death, are not includable as income of decedent for the period prior to his death.

3. Id.—Interest on decedent's contributed partnership capital, as well as interest on his credit balance with the

partnership for the period between the end of the partnership's fiscal year and his death, is merely partnership profits (Billwiller's Estate, 31 Fed. (2d) 286; certiorari denied, 279 U. S. 866; John A. L. Blake, 9 B. T. A. 651), and, as such, is likewise here not taxable as income to decedent for the period prior to his death.

Weston Vernon, Jr., Esq., for the petitioner. Harold Allen, Esq., for the respondent.

The petitioner, as executor of the estate of Lamar L. Fleming, deceased, seeks redetermination of a deficiency in income tax of $39,874.31 for the taxable period from January 1 to December 16, 1933. The petitioner alleges that the respondent erred in including in the decedent's income for that period, his distributive share of the profits of a partnership, of which he was a member, from July 31 to December 16, 1933, when he died. He makes the same contention as to certain commissions earned by the partnership, and certain interest due decedent from the partnership. The facts have been stipulated and from them [fol. 64] we make the following findings of fact.

FINDINGS OF FACT

The decedent, Lamar L. Fleming, died December 16, 1933. For a number years prior to his death he was a member of the partnership of Anderson, Clayton & Fleming, engaged in the cotton business, with its principal place of business in New York City and branches in other cities of the United States and Europe.

The business of the partnership was operated on the cash receipts and disbursements basis with a fiscal year ending July 31 of each year. The decedent likewise kept his accounts on the cash receipts and disbursements basis, but kept his accounts and made his tax returns on a calendar year basis.

On August 1, 1933, a new partner was admitted to the firm and a new partnership agreement was made, which was identical with the previous one, except as to the division of the profits. This new agreement provided that its fiscal year should begin August 1, 1933, and end July 31, 1934.

In accordance with the contract of partnership an account was taken at the end of the fiscal year July 31, 1933, and decedent was notified of his share of the profits for the preceding 12 months. A large portion of his share was allowed to remain to his credit with the partnership.

No part of the earnings of the partnership for the period between the end of the fiscal year July 31, 1933, and his death was paid to or received by the decedent. The part-
[fol. 65] nership agreements provided for but one yearly accounting and settlement, which was at the end of the fiscal year.

After the death of Lamar L. Fleming the business of the partnership was continued by the surviving partners under the same name. In May 1934, they entered into a new contract of partnership taking over the business as of December 18, 1933, and providing for a fiscal year ending July 31, 1934, and from year to year thereafter.

Shortly after the death of decedent an account was taken covering the period from August 1 to December 16, 1933, and on or about January 9, 1934, decedent's executors received in partial distribution and liquidation of the partnership $298,730.19, which consisted of the $100,000 capital invested by the decedent, the credit balance on deposit due decedent of $162,795.67, and decedent's share of the profits of the partnership between the end of its fiscal year July 31, 1933, and decedent's death, December 16, 1933, in the sum of $35,150.88, and interest of $783.64.

In February 1934, decedent's executors received a final distribution of $15,067.39 and interest of $82.56. This latter sum included $13,894.74 as decedent's share of commissions earned by the partnership between the end of its fiscal year and the death of decedent, but not collected until 1934 in accordance with a trade custom.

Decedent's executors duly filed his income tax return for the period January 1 to December 16, 1933, date of his death, and included therein his distributive share of the profits of the partnership for the fiscal year ending July 31, 1933, but did not include therein his share of the profits
[fol. 66] of the partnership earned between July 31, 1933, the end of its fiscal year and the date of his death, December 16, 1933. Likewise the decedent's share of the open commissions earned during that period and interest on his capital investment and credit balance with the partnership were omitted.

In determining the deficiency the respondent included in decedent's income the sum of $63,494.46 representing partnership profits for the period between July 31 and December 16, 1933, and $5,559.19 unreported interest. The item of $63,494.46 included the cash earnings of the part-

nership during the period and also the uncollected commissions earned during that period in the sum of $13,894.74. The unreported interest of $5,559.19 consisted of $3,209.19 interest on decedent's credit balance for that period, $2,300 interest on his capital investment, and $50 from some other source.

The executors of the estate of the decedent duly filed an estate tax return, which included decedent's credit balance with the partnership, his capital interest therein and his share of the profits earned during the period August 1 to December 16, 1933, and paid the estate tax thereon.

On February 28, 1934, the survivors of the partnership filed a return for it in liquidation for the fiscal year beginning August 1, 1933, and ended December 16, 1933, and on October 28, 1934, they filed a return for the fiscal year December 17, 1933, to July 31, 1934. Both of these were made without permission or direction of the respondent.

On or about March 5, 1935, the executors of the estate of the decedent waived the restrictions upon the assess- [fol. 67] ment of $37,917.39 out of a total deficiency in tax determined by the Commissioner in his letter of October 25, 1934, amounting to $39,874.31. Such waiver was made after the petition to the Board of Tax Appeals had been filed herein, and was made without prejudice to the right of the executors to prosecute the pending appeal and to recover any amount refundable under the final decision of the Board herein. Following the waiver of the restrictions upon the assessment of $3,917.39, the Commissioner assessed such amount against the executors of the decedent, together with interest thereon in the amount of $2,318.67, making a total of $40,236.06. The Commissioner applied as a credit against such taxes and interest the amount of an overassessment in the decedent's income tax for the calendar year 1932, amounting to $1,956.92, together with interest thereon amounting to $149.02, and issued a notice and demand upon the decedent's estate for a total of $38,130.12, consisting of $35,811.45 in tax and interest of $2,318.67, which was paid by the decedent's executors on April 15, 1935.

OPINION

LEECH:

The dominant issue is whether decedent's return for the period from January 1 to December 16, 1933, the date of

his death, should include decedent's share of the partnership profits for the interval between July 31, 1933, the end of the partnership's fiscal year, and December 16, 1933, when decedent died. Both decedent and the partnership were on a cash receipts and disbursements basis.

[fol. 68] The Revenue Act of 1932 is controlling. Section 182 (a) provides:

Sec. 182. Tax of Partners.

(a) General Rule.—There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership, for any taxable year of the partnership ending within his taxable year.

The "taxable year" of the partnership differed here from the "taxable year" of the decedent, since such year of the partnership was its fiscal year ended July 31, 1933, and that of the decedent was the calendar year. Sec. 48 (a).[1] Thus the determination of decedent's taxable income for the period from January 1 to December 16, 1933, when he died, "*shall* be based upon the income of the partnership [fol. 69] for any taxable year of the partnership ending within his taxable year." Sec. 182 (a), supra. A taxable year of the partnership ended on July 31, 1933. No other such year ended before decedent's death, unless decedent's death, ipso facto, terminated a second "taxable year" of the partnership.

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[1] Sec. 48. Definitions.

When used in this title—

(a) Taxable Year.—"Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. "Taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1932, shall be the calendar year 1932 or any fiscal year ending during the calendar year 1932.

The partnership contract provided for only one accounting period, which was at the close of the fiscal year. A provision for any other termination of the taxable year, except by mutual agreement, was not included in the contract. Article nine of the agreement reads in part as follows:

In the event of any dissolution of the co-partnership under any provision of this agreement or in any manner or for any cause whatsoever, the assets thereof shall be applied first, to the payment of the debts thereof; second, to the return of the capital invested therein by any partner hereto; and third, to the distribution of the profits or surplus in accordance with the provisions hereinabove set forth for the distribution of net gains and profits.

The surviving partners, after decedent's death, carried on the partnership for the purpose of its liquidation, which was not completed until 1934. None of the proceeds of that liquidation were received by or available to decedent, and were not available to or received by petitioner, his representative, until 1934.

This partnership was a New York firm. Under the law of that state, not only the addition of a partner does not effect the dissolution of a partnership, (Helvering v. [fol. 70] Archbald, 70 Fed. (2d) 720), but the death of the decedent partner, though it may cause dissolution, certainly does not terminate the "taxable year" of the partnership where, as here, the surviving partners continue it for purposes of liquidation. Partnership Law of New York, secs. 60, 61 and 62.[2]

As this Board held in Abe De Roy et al., Executors, 19 B. T. A. 452, upon identical facts arising under section

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[2] § 60. Dissolution defined. The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

§ 61. Partnership not terminated by dissolution. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

§ 62. Dissolution is caused:

* * * * * * *

(4) By the death of any partner;

218 (a) of the Revenue Act of 1924, which is substantially the same as section 182 (a) of the Revenue Act of 1932, supra, here applicable:

* * * The death of the partner did not terminate or shorten the accounting period of the partnership and there was only one accounting period of the partnership ending in the decedent's taxable year before us. * * * See R. W. Archbald, Jr., et al., Executors, 4 B. T. A. 483, where we said:

"It seems clear to us that the death of a partner does not shorten the partnership's fiscal or calendar year to an accounting period terminating at the death of the partner [fol. 71] and that only a complete liquidation during the calendar or fiscal year terminates the accounting period. This partnership has but one accounting period ending in 1920. The statutory net income of the partnership could not in this instance be computed before the close of its fiscal year. This being our view, we must hold that there should be included in the deceased's return of income for 1920 only his distributive share of the partnership net income for its fiscal year ending January 31, 1920."

To sustain respondent and include in decedent's taxable income, for the period prior to his death, the partnership income earned between July 31, 1933, the end of the partnership's fiscal year, and December 16, 1933, the date of Decedent's death, would require our violation of the basic tenet of income tax law that such tax is assessed on the basis of a period of 12 months. See Helvering v. Morgan's Inc., 293 U. S. 121; General Machinery Corporation, 33 B. T. A. 1215. The Revenue Act of 1932, section 47, specifically provides for "Returns for a period of less than twelve months." See also section 48 (a) supra. The statute does not include a provision permitting returns for a period of more than twelve months. This Board refused to increase such period in the De Roy case, supra, and in R. D. Archbald, Jr., et al., Executors, 4 B. T. A. 483. Both of those cases are directly in point. The De Roy case involved facts identical with those here, and it was decided after the appeal of Maurice L. Goldman et al., Executors, 15 B. T. A. 1341, which qualified the rule adopted in the [fol. 72] Archbald case. See United States v. Wood, 79 Fed. (2d) 286; G. C. M. 2308, vol. VI-2 C. B. 229, 1927.

Respondent cites Maurice L. Goldman et al., Executors, supra; Clarence B. Davison, Executor, 20 B. T. A. 856; affd., 54 Fed. (2d) 1077; J. L. Hall et al., Executors, 25 B. T. A. 1; Beverly W. Smith, Administrator, 26 B. T. A. 778; affd., 67 Fed. (2d) 167; First Trust Co. of Omaha v. United States, 1 Fed. Supp. 900; Peoples-Pittsburgh Trust Co. v. United States, 10 Fed. Supp. 139. None of these cases, nor any other to which our attention has been directed, disturbs the rule followed in the Archbald and De Roy cases in its application to the facts presented here.

The argument that the disputed income thus escapes income tax should be addressed to Congress, not to this Board. See Commissioner v. City Bank Farmers Trust Co., 296 U. S. 85; Sawtell v. Commissioner, — Fed. (2d) — (C. C. A., 1st Cir., March 6, 1936).

Respondent's contention, that the returns filed by the surviving partners estop petitioner from taking his present position, is untenable. Those returns were filed without the consent of the Commissioner. In our view of the law just stated, which, of course, the surviving partners could not alter, these returns were neither authorized nor required. Revenue Act of 1932, sec. 189;[3] Regulations 77, art. 941.[4]

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[3] Sec. 189. Partnership Returns

Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

[4] Art. 941. Partnership returns.—Every partnership must make a return of income, regardless of the amount of its net income. The return shall be on Form 1065 and shall be sworn to by one of the partners. Such return shall be made for the taxable year of the partnership, that is, for its annual accounting period (fiscal year or calendar year, as the case may be), irrespective of the taxable years of the partners. (See sections 182 and 183 and articles 901-903.) If the partnership makes any change in its accounting period, it shall make its return in accordance with the provisions of section 47 and article 371. (See also article 744.)

[fol. 73] But, aside from other frailties, the argument falls because it is not established that respondent relied upon any act of the decedent or petitioner to respondent's detriment. When petitioner took the position upon which he now stands, on instituting these proceedings, respondent could have then availed himself of any steps possible to him which were so prior to the filing of these returns. No statute of limitations prevented such steps. Revenue Act of 1932, sec. 275 (a).[5] The absence of that detriment here, alone, defeats the plea of estoppel. Helvering v. Brooklyn City R. Co., 72 Fed. (2d) 274. The petitioner is sustained on the first and controlling issue.

The second issue relates to the propriety of respondent's action in including in decedent's prior-to-death return the open or uncollected commissions on sales by the partnership which were earned subsequent to the end of the partnerships' fiscal year, and not collected until 1934, after the [fol. 74] death of the decedent. Since the partnership was on a cash basis and the practice of the trade, in which the partnership was engaged, was that such commissions were not payable to the firm until 1934, after delivery in the execution of the sale, it is at least doubtful whether these commissions could be held to have been constructively received, even by the partnership before that year. Revenue Act of 1932, sec. 42.[6] Avery v. Commissioner, 291 U. S. 657. In any event, these commissions, even if constructively received by the partnership between July 31, 1933,

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[5] Sec. 275. Period of Limitation Upon Assessment and Collection

Except as provided in section 276—

(a) General Rule.—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

[6] Sec. 42. Period in Which Items of Gross Income Included

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.

and decedent's death, were earnings of the partnership. Thus, respondent's inclusion of them in decedent's income for the questioned period is precluded by the same rule applied above. R. W. Archbald, Jr. et al., Executors, supra; Abe De Roy et al., Executors, supra. The suggestion of respondent, that this item was not mentioned in the pleadings and therefore should not be considered now, is without merit. These commissions were merely a part of the partnership profits for the disputed period, all of which are in controversy. They were included in the stipulated facts upon which the case was submitted for determination.

Respondent refers to section 42 of the Revenue Act of [fol. 75] 1934[7] as a "clarification of existing law." We disagree with that construction. That provision, in our judgment, changed the law. Nichols v. United States, 64 Ct. Cls. 241; Report of the Ways and Means Committee, p. 24, H. R. No. 704, 73d Cong., 2d sess. Neither the provision itself, nor the cited report, indicates its operation was intended to be retroactive. Thus it can not be so construed. Shwab v. Doyle, 258 U. S. 529. Cf. Goldfield Consolidated Mines Co. v. Scott, 247 U. S. 126.

The third issue involves the correctness of respondent's inclusion of two items of interest in decedent's taxable income for the period immediately prior to his death. These items consist of interest in the amount of $2,300 on his capital investment in the firm, and interest in the amount of $3,209.19 on the credit balance which decedent had left with the partnership.

The fourth article of the contract of the partnership is that:

All capital shall bear interest at the rate of six per cent

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[7] Sec. 42. Period in Which Items of Gross Income Included

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period.

(6%) per annum, or at such other rate as mutually may be [fol. 76] agreed upon between the partners, which interest shall be credited or paid at the end of each fiscal year during the continuance of the co-partnership and shall be charged to the expenses of the business.

But despite this proviso concerning the first item, we think both items, denominated interest, were merely partnership profits and taxable to decedent just as any other such profits. Billwillter Estate v. Commissioner, 31 Fed. (2d) 286; certiorari denied, 279 U. S. 866; John A. L. Blake, 9 B. T. A. 651. These items were, therefore, also improperly included by respondent in decedent's taxable income here. R. W. Archbald, Jr., et al., Executors, supra; Abe De Roy et al., Executors, supra.

Decision will be entered under Rule 50.

[fol. 77] Before United States Board of Tax Appeals, Washington, D. C.

Docket No. 78362

Guaranty Trust Company of New York, Executor, Estate of Lamar L. Fleming, Petitioner,

v.

Commissioner of Internal Revenue, Respondent

Decision

Pursuant to the Opinion of the Board promulgated April 21, 1936, the respondent herein having filed on May 12, 1936, a notice of settlement and proposed recomputation, which was placed on the Day Calendar of June 3, 1936, and, at the call of the same on said Calendar, the petitioner, through counsel, having filed on May 29, 1936 a motion praying that the Board enter a decision in accordance with said recomputation, now, therefore, it is

Ordered and Decided: that the petition herein respecting income tax liability for the period January 1, 1933 to December 16, 1933, was filed on January 19, 1935, and claims for refund were filed by petitioner on February 15, 1935 and May 21, 1935; that within two years before the filing of the petition, tax was paid and credited in the amount of

$114,297.45, for the period January 1, 1933 to December [fol. 78] 16, 1933; that the liability for said period is $76,408.56; and, therefore, in accordance with section 504 (a), Title III of the Revenue Act of 1934, there is an overpayment of $37,888.89 for the period January 1, 1933 to December 16, 1933.

(Signed) J. Russell Leech, Member. (Seal.)

Entered Jun. 4, 1936.

[fol. 79] In United States Circuit Court of Appeals for the Second Circuit

[Title omitted]

Petition for Review and Assignments of Error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Robert H. Jackson ,Assistant Attorney General, Herman Oliphant, General Counsel for the Bureau of Internal Revenue, and R. H. Transue, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

Your petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States. [fol. 80] Your respondent on review (hereinafter referred to as the taxpayer) is a corporation with principal place of business at New York, New York. As executor of the Estate of Lamar L. Fleming, deceased, the taxpayer filed its income tax return for the period involved in this case with the Collector of Internal Revenue for the Second District of New York, whose office is located in the city of New York and within the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

II

The Commissioner determined a deficiency in Federal income tax against the taxpayer for the period January

1 to December 16, 1933 in the amount of $39,874.31, and on October 25, 1934, in accordance with the provisions of section 272, Revenue Act of 1932, sent to the taxpayer by registered mail a notice of said deficiency. Thereafter, on January 19, 1935, the taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals, being Docket No. 78362. On April 21, 1936 the said Board of Tax Appeals promulgated its opinion and on June 4, 1936 entered its final order and decision in said appeal wherein and whereby the Board of Tax Appeals ordered and decided that the deficiency asserted by the Commissioner was erroneous. The opinion of the Board is published in 34 B. T. A. 384.

III

The nature of the controversy is as follows:

The petition for review grows out of the determination by the Commissioner that the taxable net income of the [fol. 81] taxpayer should be increased in the amount of $49,599.72, representing the decedent's distributive share of the profits of the partnership of Anderson, Clayton & Fleming for the period August 1, 1933 to December 16, 1933. No exception is taken by the Commissioner to the exclusion by the Board from taxable income of the taxpayer for this period of (1) the decedent's distributive share of commissions earned by such partnership but not collected between the end of its fiscal year and decedent's death and not collected by the partnership nor received by or available to decedent prior to his death and (2) interest on the decedent's contributed partnership capital as well as interest on his credit balance with the partnership for the period between the end of the partnership's fiscal year and the date of his death.

The facts involved were stipulated by the parties and are as follows:

The decedent, Lamar L. Fleming, died December 16, 1933. For a number of years prior to his death he was a member of the partnership of Anderson, Clayton & Fleming, engaged in the cotton business, with its principal place of business in New York City and branches in other cities of the United States and Europe.

The business of the partnership was operated on the cash receipts and disbursements basis with a fiscal year ending July 31 of each year. The decedent likewise kept his accounts on the cash receipts and disbursements basis, but kept his accounts and made his tax returns on a calendar year basis.

On August 1, 1933, a new partner was admitted to the [fol. 82] firm and a new partnership agreement was made which was identical with the previous one, except as to the division of the profits. This new agreement provided that its fiscal year should begin August 1, 1933, and end July 31, 1934.

In accordance with the contract of partnership an account was taken at the end of the fiscal year July 31, 1933, and decedent was notified of his share of the profits for the preceding twelve months. A large portion of his share was allowed to remain to his credit with the partnership. No part of the earnings of the partnership for the period between the end of the fiscal year July 31, 1933, and his death was paid to or received by the decedent. The partnership agreements provided for but one yearly accounting and settlement, which was at the end of the fiscal year.

After the death of Lamar L. Fleming the business of the partnership was continued by the surviving partners under the same name. In May 1934, they entered into a new contract of partnership taking over the business as of December 18, 1933, and providing for a fiscal year ending July 31, 1934, and from year to year thereafter.

Shortly after the death of decedent an account was taken covering the period from August 1 to December 16, 1933, and on or about January 9, 1934, decedent's executors received in partial distribution and liquidation of the partnership $298,730.19, which consisted of the $100,000 capital invested by the decedent, the credit balance on deposit due decedent of $162,795.67, and decedent's share of the profits of the partnership between the end of its fiscal year July 31, 1933, and decedent's death, December 16, 1933, in [fol. 83] the sum of $35,150.88, and interest of $783.64.

In February 1934, decedent's executors received a final distribution of $15,067.39 and interest of $82.56. This latter sum included $13,894.74 as decedent's share of commissions earned by the partnership between the end of its fiscal year and the death of decedent, but not collected until 1934 in accordance with a trade custom.

Decedent's executors duly filed his income tax return for the period January 1 to December 16, 1933, date of his death, and included therein his distributive share of the profits of the partnership for the fiscal year ending July 31, 1933, but did not include therein his share of the profits of the partnership earned between July 31, 1933, the end of its fiscal year and the date of his death, December 16, 1933. Likewise the decedent's share of the open commissions earned during that period and interest on his capital investment and credit balance with the partnership were omitted.

In determining the deficiency the Commissioner included in decedent's income the sum of $63,494.46 representing partnership profits for the period between July 31 and December 16, 1933, and $5,559.19 unreported interest. The item of $63,494.46 included the cash earnings of the partnership during the period and also the uncollected commissions earned during that period in the sum of $13,894.74. The unreported interest of $5,559.19 consisted of $3,209.19 interest on decedent's credit balance for that period, $2,300 interest on his capital investment, and $50 from some other source.

The executors of the estate of the decedent duly filed an [fol. 84] estate tax return, which included decedent's credit balance with the partnership, his capital interest therein and his share of the profits earned during the period August 1 to December 16, 1933, and paid the estate tax thereon.

On February 28, 1934, the survivors of the partnership filed a return for it in liquidation for the fiscal year beginning August 1, 1933, and ended December 16, 1933, and on October 28, 1934, they filed a return for the fiscal year December 17, 1933, to July 31, 1934. Both of these were made without permission or direction of the Commissioner.

The Board of Tax Appeals held that no part of taxpayer's distributive share of the partnership profits of Anderson, Clayton & Fleming for the period August 1, 1933, to December 16, 1933, in the amount of $49,579.72 constituted income of the taxpayer for the period January 1 to December 16, 1933.

The Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination entered by the Board, manifest error occurred and intervened to the prejudice of the Commissioner, and the Commissioner hereby as-

signs the following errors which he avers occurred in such record, proceedings, decision and final order of redetermination so entered by the Board, to wit:

1. The Board erred in holding that only the distributive share of the profits of the partnership of Anderson, Clayton & Fleming for its fiscal year ended July 31, 1933 is includable in the taxable income of the taxpayer for the period January 1 to December 16, 1933.

[fol. 85] 2. The Board erred in not holding that the distributive share of the profits of the partnership of Anderson, Clayton & Fleming for the period August 1, 1932 to December 16, 1933 is includable in the taxable income of the taxpayer for the period January 1 to December 16, 1933.

3. The Board erred in finding that the entire deficiency asserted by the Commissioner was erroneous.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) Robert H. Jackson, Assistant Attorney General. (Signed) Herman Oliphant, General Counsel for the Department of the Treasury. (Signed) R. H. Transue, Special Attorney, Bureau of Internal Revenue.

[fol. 86] *Duly sworn to by R. H. Transue. Jurat omitted in printing.*

[fol. 87] In United States Circuit Court of Appeals

[Title omitted]

Notice of Filing Petition for Review

To Guaranty Trust Company of New York, Executor, Estate of Lamar L. Fleming, 140 Broadway, New York, New York:

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of August, 1936, file

with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

[fol. 88] Dated this 21st day of August, 1936.

(Signed) Herman Oliphant, General Counsel for the Department of the Treasury.

[fol. 89] [Title omitted]

STATE OF NEW YORK,
County of New York, ss:

Morris Heier, being first and duly sworn, says:

I am a citizen of the United States of America, over the age of twenty-one years and not a party to or in any way interested in the petition for review to the United States Circuit Court of Appeals for the Second Circuit in the above-entitled case;

That, on the 24th day of August 1936, I did personally serve a copy of the said petition for review and also a copy of notice of filing petition for review on E. T. Murray, Jr., Secretary, Guaranty Trust Company of New York, 140 Broadway, New York, N. Y.

(Signed) M. Heier, Internal Revenue Agent.

Subscribed and sworn to before me this 27th day of August, 1936. (Signed) J. P. O'Keefe, Internal Revenue Agent.

[fol. 90] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW

To Weston Vernon, Jr., Esq., 15 Broad Street, New York, New York:

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of August, 1936, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit,

of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated, this 21st day of August, 1936.

(Signed) Herman Oliphant, General Counsel for the Department of the Treasury.

[fol. 91] Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 27th day of August, 1936.

(Signed) Weston Vernon, Jr., Attorney for Respondent on Review.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PRÆCIPE FOR RECORD

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit [fol. 92] Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board,
(a) Petition, including annexed copy of deficiency letter.
(b) Answer.
3. Findings of Fact, Opinion and Decision of the Board.
4. Petition for Review, together with proofs of service of notice of filing petition for review and of service of a copy of petition for review.
5. This præcipe.

(Signed) Herman Oliphant, General Counsel for the Department of the Treasury.

Service of a copy of the within præcipe is hereby admitted this 15th day of October, 1936.

(Signed) Western Vernon, Jr., Attorney for Respondent.

[fol. 93] In United States Circuit Court of Appeals

[Title omitted]

Respondent's Præcipe for Record

To the Clerk of the United States Board of Tax Appeals:

Please include in the record which you are preparing pursuant to the præcipe for record filed on October 17th, 1936 by the Commis-ioner of Internal Revenue, and deliver to the Clerk of the Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in addition to those listed in the Commissioner's præcipe filed on October 17th, 1936:

1. Stipulation of Facts and Exhibits dated November 11, 1935, including exhibits A, B, C, D and E attached thereto.
2. Supplemental Stipulation of Facts dated November 11, 1935.
3. This præcipe.

Weston Vernon Jr., Attorney for Respondent.

[fol. 94] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 95] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1936

Argued April 7, 1937. Decided May 3, 1937

No. 262

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

GUARANTY TRUST COMPANY OF NEW YORK, Executor, Estate of Lamar L. Fleming, Respondent

Appeal from the Board of Tax Appeals

Before Manton, L. Hand, and Chase, Circuit Judges

Petition to review a decision of the Board of Tax Appeals. On appeal from the determination by the Commissioner of a deficiency the Board found an over-payment of taxes. Reversed.

Robert H. Jackson, Asst. Atty. Gen., and Sewall Key, S. Louis Monarch, and Alexander Tucker, Sp. Asst. to Atty. Gen., for petitioner.

Davis, Polk, Wardwell, Gardiner & Reed, of New York City (Walter D. Fletcher, Weston Vernon, Jr. and Allen A. Dobey, all of New York City, of counsel), for respondent.

CHASE, Circuit Judge:

The respondent is the executor of the estate of Lamar L. Fleming, who died on December 16, 1933. Mr. Fleming was at the time of his death a resident of New York and a member of the partnership of Anderson, Clayton & Fleming whose principal place of business was in New York City. The decedent had filed his returns of income for calendar years on the cash receipts and disbursements basis. The partnership had filed its information returns on the same method of accounting but for fiscal years ending July 31st. On July 31, 1933, a new partner was admitted and a new partnership agreement was executed which kept the fiscal year the same and provided for the distribution of profits at the end of the fiscal year. No partnership profits earned

after July 31, 1933, were received or were receivable by the decedent under the terms of the partnership agreement up to the time of his death. Though all previous earnings to which he was entitled were available to him, he left a portion of them on deposit with the partnership.

After Mr. Fleming died there was an accounting for the period between July 31, 1933, and the date of his death and in January, 1934, a partial, and in the following month a final, distribution was made to his executor of his credit deposit and his share of the earnings up to the time he died.

His executor filed an income tax return for him for the period from January 1, 1933, to December 16, 1933, in which were included his entire share of the partnership profits for the fiscal year ending July 31st but none for the remainder of 1933 to the date of his death. The profits for the last-mentioned period were, however, included in the estate tax return filed for him. On February 28, 1934, an information return was filed "for the fiscal year beginning August 1, 1933, and ended December 16, 1933," for the partnership in liquidation.

The deficiency determined by the Commissioner was the result of his inclusion in the income of the decedent of his share of the profits earned after July 31, 1933, up to his death. The Board held those profits were not includable, and whether or not they were is the issue before us.

Section 181 of the Revenue Act of 1932 (47 Stat. 222, 26 U. S. C. A. § 181 and note) provided, as did previous stat- [fol. 96] utes, that partners should be liable for an income tax only in their individual capacity, and section 182 of the same act (47 Stat. 222) taxed to each partner his distributive share of the net partnership income for the taxable year, whether distributed or not. It also provided that: "If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year." Regulations follow the statute in this respect.

Whether the death of Mr. Fleming within his taxable year brought about the ending of what is called in the statute a "taxable year of the partnership" determines whether the Commissioner or the Board was right. As the partnership was subject to the laws of New York, it was not terminated by the death of Mr. Fleming, though

it was dissolved and continued only for purposes of liquidation until the partnership affairs were wound up. Sections 60, 61, and 62, subd. 4 of the New York Partnership Law (Consol Laws, c. 39). As a continuing source of income to the decedent, it ceased to exist when he died. Darcy v. Commissioner (C. C. A.) 66 F. (2d) 581. The accounting whenever it took place was as of that date. That was when in contemplation of law his share of the profits became distributable. That is to say, though a partnership is not a taxpayer, what is called a partnership taxable year ended when the partnership was dissolved by the death of a partner. Of course this made two "partnership taxable years" end in one taxable year of the decedent. Yet that did not make his taxable year include his income for more than twelve months. It did, indeed, include his share of partnership income for more than a twelve-month period, but that is immaterial since the partnership is not the taxpayer. The period for which the decedent's income is taxed is a little less than twelve months and the income on which he is taxed is only that distributable to him as of that period. To be sure, it was not physically possible to distribute any post July 31, 1933, partnership income to him after his death but whatever partnership profits were earned from July 31, 1933, to the date of his death later in that year were nevertheless to the extent of his share earned by him in his lifetime and taxable to him as income though they might form a part of the corpus of his estate and be subject to an estate tax also. Bull v. United States, 295 U. S. 247, 254, 55 S. Ct. 695, 697, 79 L. Ed. 1421.

Strictly speaking, a partnership has no taxable year since it is not a taxpayer. It is required to file information returns for so-called taxable years which are either fiscal or calendar and are in fact accounting periods covering twelve months. This does not mean that there can be no accounting period of a partnership for income tax purposes for less than twelve months. The present case serves well as an example of what will shorten such an accounting period or taxable year of a partnership, viz., the dissolution of the partnership caused by the death of a partner after the beginning of the current year and before its end. Another would be a partnership which for one reason or another never existed for a full year. So we hold that the phrase "partnership taxable year," as

used in section 182(a) of the Revenue Act of 1932, should be construed to include an accounting period of the partnership fixed at less than a year by the dissolution of the partnership caused by the death of a partner. Consequently the Commissioner properly included the decedent's share of the post July 31, 1933, partnership income.

Decision reversed.

[fol. 97] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 10th day of May one thousand nine hundred and thirty-seven.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Harrie B. Chase, Circuit Judges.

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, as Executor, etc., Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is reversed.

It is further ordered that a mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 98] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Commissioner of Internal Revenue vs. Guaranty Trust Company of New York, etc. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 10, 1937. William Parkin, Clerk.

[fol. 99] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 98, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Commissioner of Internal Revenue, Petitioner, against Guaranty Trust Company of New York, as Executor, etc., Respondent, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this fourth day of June, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 100] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: File No. 41,782. U. S. Circuit Court of Appeals, Second Circuit. Term No. 301. Guaranty Trust Company of New York, Executor, Estate of Lamar L. Fleming, Deceased, petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed August 10, 1937. Term No. 301, O. T., 1937.

FILE COPY

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FILED
AUG 10 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1937.

No. [redacted] 301

GUARANTY TRUST COMPANY OF NEW YORK,
Executor, Estate of Lamar L. Fleming, Deceased,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN W. DAVIS,
Attorney for the Petitioner,
15 Broad Street,
New York, N. Y.

THE BALLOU PRESS NEW YORK

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1937.

GUARANTY TRUST COMPANY OF NEW YORK, Executor, Estate of Lamar L. Fleming, Deceased,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Petition.

The Petitioner, Guaranty Trust Company of New York, Executor, by its undersigned attorney, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review the judgment of that Court entered in the above cause on May 10, 1937. This suit originated in the Board of Tax Appeals on an appeal from a deficiency notice imposing additional income taxes of $39,874.31 for the period from January 1, 1933, to the date of the decedent's death on December 16, 1933. The case was tried on stipulated facts and exhibits. On June 4, 1936, the Board entered its judgment resolving all issues in favor of the petitioner, and, since part of the asserted deficiency had been paid, it determined that there was an over-payment of

$37,888.89 in the decedent's income taxes for the prior-to-death period. The Commissioner sought a review by the Circuit Court of Appeals for the Second Circuit of one issue involved, namely, whether the decedent's share of the earnings of a partnership of which he was a member, for the period from August 1 to December 16, 1933, but not distributed to him or his executors during that period, should be included in the decedent's income for the prior-to-death period, although there had already been included in such income the decedent's share of a full 12-months earnings of the partnership for its fiscal year ended July 31, 1933. The Circuit Court reversed the Board upon this issue. A certified copy of the transcript of record in the case, including the proceedings in the Circuit Court of Appeals, has been filed herewith in accordance with Rule 38 of this Court.

Statement of the Case.

Petitioner's testator, Lamar L. Fleming, died December 16, 1933. Prior to his death, he was a member of the partnership of Anderson, Clayton & Fleming, cotton brokers, of New York (R. 64).

The decedent kept his accounts on the cash receipts and disbursements basis. He made his tax returns on a *calendar* year basis. The accounts of the partnership were likewise kept on a cash basis. The business was operated and the partnership's tax returns were filed, however, on the basis of a *fiscal* year ending July 31 of each year (R. 64).

The partnership had operated under successive partnership agreements since 1918 (R. 19). The partnership agreements provided for a fiscal year ending July 31 of each year (Ex. A; R. 30), and when a new partner was admitted on July 31, 1933, the new agreement (Ex. B; R. 38) established an accounting period of the partnership upon the basis of a fiscal year ended July 31 of each year. The fiscal year of the partnership beginning August 1, 1933, was to continue until July 31, 1934, and the net profits for each fiscal year were

to be ascertained and distributed among the partners within a reasonable period after the close of such fiscal year (Ex. B; R. 38, 41).

Pursuant to the partnership articles a "general account" was taken at the end of the fiscal year, July 31, 1933; the decedent was notified of his share of the partnership earnings and the entire amount of such earnings for the full 12-month period was included in the income tax return filed on his behalf for the portion of the calendar year 1933 while he was alive (R. 65, 66). No part of the partnership earnings between the end of its fiscal year on July 31, 1933, and the decedent's death on December 16, 1933, was paid to or received by the decedent (R., 64). No part of such earnings was available to the partners prior to that time, since the partnership agreement provided for only one annual accounting and distribution of profits, and that upon the termination of the partnership's fiscal year (Ex. B; R. 41).

Following the decedent's death the business of the partnership was continued under the same name by the surviving partners (R. 65). Early in May, 1934, the surviving partners executed a new partnership agreement (Ex. C; R. 46-54), taking over the business as of December 18, 1933, and providing for a fiscal year ending July 31, 1934, and each year thereafter (Ex. C; R. 47).

After the death of the decedent, an account was taken covering the period from August 1 to December 16, 1933. Not until January 9, 1934, did the decedent's executors receive any part of the decedent's share of the partnership earnings for the period July 31 to December 16, 1933 and it was not until February, 1934, that the decedent's executors received the final distribution (R. 65). The decedent's share of the partnership earnings for the period August 1 to December 16, 1933, ~~were~~ WAS included in his estate tax return and the estate tax was paid thereon (R. 66).

The Commissioner determined that there should have been included in the decedent's income tax return for the period from January 1 to the date of his death on December 16,

1933, not only his share of the partnership earnings for the full 12-month fiscal year of the partnership ended July 31, but also his share of all the partnership earnings for the period from August 1 to the date of the decedent's death.

The Board refused to sustain the Commissioner's determination, following instead the uniform rulings of the Commissioner and the Board's own decisions supporting the taxpayer's position. The Commissioner acquiesced in the Board's decision as to two items, namely, interest on decedent's credit balance and capital for the period from August 1 to December 16, 1933, and the decedent's share of certain commissions earned during that period, but not collected by the partnership until some time in 1934. The Commissioner obtained a review, however, of the Board's decision with respect to the decedent's share of the partnership earnings actually collected by it during the period August 1 to December 16, 1933, amounting to $49,599.72. On this item the Circuit Court of Appeals for the Second Circuit reversed the Board.

The Question Presented.

The question is whether the decedent's income for the prior-to-death period, January 1 to December 16, 1933, should include not only his share of partnership earnings for the full 12-month fiscal year of the partnership ended July 31, 1933, but also his share of partnership earnings subsequent to the close of the regular partnership fiscal year, where the decedent reported his income on the cash receipts and disbursements basis and no part of such earnings ~~were~~ WAS received by or available to him or his representatives during the calendar year 1933.

Reasons for Granting the Writ.

1. The Court below has decided an important question of Federal law which has not been, but should be settled by this Court.

The decision of the Court below is the first, in any court of which we are aware, holding that there may be subjected to tax in one calendar year more than a year's current income. Despite the basic tenet of the income tax law that income taxes are assessed upon the basis of a 12-month period (See *Helvering* v. *Morgan's Inc.*, 293 U. S. 127; *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359), the Court below held that the decedent's income for 1933 should include not only his share of the partnership earnings for the full 12-month fiscal year of the partnership ended July 31, 1933, but also the decedent's share of partnership earnings for the additional 4½ months' period, from August 1 to December 16, 1933. By including in the decedent's income for one taxable period his share of partnership earnings for a 16½-months' period, the Court below placed him in a 50% surtax bracket instead of the 29% bracket applicable had he lived. Likewise, under the decision of the Court below, the surviving partners are placed in higher surtax brackets.

The only explanation offered by the Court below for its departure from the accepted rule was as follows:

> "Yet that did not make his taxable year include his income for more than twelve months. It did, indeed, include his share of partnership income for more than a twelve-month period, but that is immaterial since the partnership is not the taxpayer."

This is curious if not meaningless. Since the partnership is not the taxpayer, its income is taxed directly to the partners as theirs. First the Court says the partnership income is not that of the partner and in the very next sentence says the partnership is not the taxpayer. The unusual hardship here results *because* the partnership is not the taxpayer and the income is treated as that of the partners. This is a significant and material principle of the tax law so far as the taxation of partnership income is concerned, and not "immaterial" as the Court below stated. Confusion may result in the administration of the tax law from the Court's assertion that the income of the partnership is not that of the partners.

In an attempted justification of the inequitable result it reached, the Court below relied upon its earlier decision in *Darcy* v. *Commissioner,* 66 F. (2d) 581 (1933), and the decision of this Court in *Bull* v. *United States,* 295 U. S. 247 (1935). The *Darcy* case is not in point, for in that case neither the decedent partner nor the surviving partners were required to include in their returns for one taxable period their income from the partnership for a period of more than a year. The Court below also misinterpreted the decision of this Court in the *Bull* case. There, the partner and the partnership had the same accounting periods and there was no question involved of a decedent partner and the surviving partners being required to include in their returns for one taxable period their income from the partnership for a period of more than 12 months.

The decision of the Court below, unless reversed, gives the Commissioner authority to include in a partner's income for one year as much as 23 months' income from a partnership. Thus, if a partnership has a fiscal year ended January 31 and a partner dies on December 31, under the ruling of the Court below, the decedent and surviving partners must include in their returns for one calendar year not only the income of the partnership for the 12-month period ended January 31, but the 11-months' income from February 1 to December 31. With normal and surtax rates which increase according to the amount of income, the effect of such a rule upon partners may be extremely harsh if not disastrous. There is neither reason nor precedent for thus singling out the partnership form of doing business, used extensively by lawyers, business men and others, and subjecting it to such unusual treatment.

2. The Court below has decided an important Federal question in a way that is in conflict with the applicable decisions of this Court.

Section 182 (a) of the Revenue Act of 1932 and similar provisions of both the earlier and later acts, provide that

where, as in the instant case, a partner and the partnership have different "taxable years", the amount of income includible in the return of the individual partner "shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year." One "taxable year" of the partnership ended within the period from January 1 to December 16, 1933, namely, the fiscal year of the partnership ended July 31, 1933. The Court below held that the death of the decedent dissolved the partnership and *ipso facto* brought to a close a second "taxable year" of the partnership within the meaning of Section 182 (a), and that an additional 4½ months' partnership income should be included in the decedent's return.

The decision of the Court below that dissolution terminates the taxable year of a partnership, is directly contrary to the decision of this Court in *Helvering* v. *Morgan's Inc., supra,* in which it was held that the "taxable year" of a corporation was not terminated through a change of status by affiliation with another corporation, even though a separate income tax return was filed for the period prior to affiliation and a consolidated income tax return for the period of affiliation.

Moreover, the Circuit Court's construction of Section 182 (a) is without precedent or authority. Two earlier decisions of the Board of Tax Appeals, directly in point, were to the contrary. *Archbald* v. *Commissioner,* 4 B. T. A. 483 (1926); *DeRoy* v. *Commissioner,* 19 B. T. A. 452 (1930). The Commissioner publicly acquiesced in the *Archbald* and *DeRoy* decisions, Cumulative Bulletin VI-1, p. 1; Cumulative Bulletin IX-2, p. 16. The ruling of the *Archbald* and *DeRoy* cases was accepted as the official position of the Treasury Department in *General Counsel's Memorandum* 2308, Cumulative Bulletin VI-2, p. 229 (1927), still unrevoked. The *Archbald* and *DeRoy* cases are supported by *Tooke* v. *Commissioner,* 17 B. T. A. 690 (1929) and *Reynolds* v. *Commissioner,* 17 B. T. A. 693 (1929) (acquiesced in by the Commissioner Cumulative Bulletin IX-1, pp. 46, 51),

where the Board held that the dissolution of a partnership does not terminate its accounting period. The decision of the Court below was the first to disturb the hitherto settled rule in cases of this character. No change in the applicable statutory provisions occurred to warrant the lower Court's decision.

Following this interpretation of Section 182 (a) in the *Archbald* case, and in *General Counsel's Memorandum* 2308, Congress re-enacted the Section without amendment in the succeeding Revenue Acts. Under the well settled rule of construction of this Court, such re-enactment of the statute without change constituted implied legislative recognition and approval of the administrative and judicial construction. *Heald* v. *District of Columbia,* 254 U. S. 20; *Helvering* v. *Bliss,* 293 U. S. 144. The Court below completely ignored this rule of construction.

The decision of the Court below conflicts with its own prior decision in *Bankers Trust Co.* v. *Bowers,* 295 Fed. 89, where it held that a change of status, or even the death of an individual does not terminate his accounting period. The decision of the Court below is also irreconcilable with numerous decisions of the Board of Tax Appeals to the effect that the dissolution of a corporation does not terminate its "taxable year". See *Mrs. Grant Smith* v. *Commissioner,* 26 B. T. A. 1178; *Palomas Land and Cattle Co.* v. *Commissioner,* 33 B. T. A. 999; *General Counsel's Memorandum* 2080, Cumulative Bulletin VI-2, p. 288.

The New York Partnership Law is identical with the Uniform Partnership Act now in force in many states. It provides that dissolution of a partnership is merely the change in relation of the partners caused by one ceasing to be associated in the carrying on "as distinguished from the winding up of the business" (Section 60, New York Partnership Law; Laws of 1919, Chapter 408; 7 U. L. A. 43). The New York Law further provides that a partnership is "not terminated by dissolution" but continues "until the winding up of partnership affairs is completed" (Section 61, New York Part-

nership Law; Laws of 1919, Chapter 408). Necessarily, the termination of the taxable year of a partnership prior to the time fixed therefor, is consistent only with the complete "termination" of the partnership itself, for until such termination the partnership may sue and be sued and it may realize income and sustain losses. In the interest of certainty, the Commissioners who drew the Uniform Partnership Act made a distinction between "dissolution" and "termination" of a partnership. The decision of the Court below ignores this distinction and fails to give heed to the purpose of the framers of the Uniform Partnership Act.

The effect of dissolution upon the taxable year of a partnership is a matter of far-reaching importance to all business conducted under the partnership form. Unexpected and unusual tax burdens may fall upon such enterprises if the rule of the Court below stands, whereas, the same results would not follow in the case of the death of an individual or dissolution of a corporation. Whether this discrimination against the partnership form of business is permissible, is a question which should be reviewed by this Court.

WHEREFORE, your Petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court on a day to be determined, a full and complete transcript of all the proceedings of such Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that the Petitioner be granted such other and further relief as may seem proper.

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August 10, 1937.

BRIEF IN SUPPORT OF THE PETITION.

Opinions Below.

The opinion of the Board of Tax Appeals is reported at 34 B. T. A. 384 (R. 62). The opinion of the Circuit Court of Appeals was rendered on May 3, 1937, and is reported at 89 F. (2d) 692.

Jurisdiction.

The final judgment of the Circuit Court of Appeals, now sought to be reviewed, was entered on May 10, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. Code Title 28, Section 347).

Statement of the Case.

The principal facts are set forth in the petition *supra*, pages 2 to 4.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the amount of $49,599.72, representing the decedent's distributive share of the profits of the partnership earned and collected by the partnership during the period August 1 to December 16, 1933, was taxable to the decedent in his 1933 return.

2. The Circuit Court of Appeals erred in failing to hold that only the decedent's distributive share of the profits of the partnership for the full 12-month fiscal year of the partnership ended July 31, 1933, constituted income taxable to the decedent for 1933.

3. The Circuit Court of Appeals erred in holding that the death of the decedent terminated the "taxable year" of the partnership.

The Statutes Involved.

The statutes involved will be found in the appendix, *infra*, pages 19 to 20.

ARGUMENT.

POINT I.

The decedent's death did not terminate a second taxable year of the partnership within the period covered by the decedent's 1933 return.

The Court below held that the decedent's death *ipso facto* terminated a second "taxable year" of the partnership within the period covered by the 1933 return of the decedent, and, consequently, under Section 182 (a), that the decedent's income for the period from January 1 to December 16, 1933, should include not only his share of the partnership income for the 12-month fiscal year of the partnership ended on July 31 of that year, but also the decedent's share of the partnership income for the period August 1 to December 16, 1933. The Board of Tax Appeals held to the contrary.

There was no provision in the partnership agreement that the death of a partner should terminate the accounting period constituting its "taxable year" (R. 38-45). Article Third of the partnership agreement provided as follows (R. 39):

> "The co-partnership hereunder shall commence as of August 1, 1933, and shall continue until July 31, 1934 (hereinafter sometimes called 'the fiscal year'), and shall be deemed to have been continued and extended from

> year to year thereafter, unless any one of the parties hereto shall give notice in writing, not less than thirty days prior to July 31st of any year, of intention to terminate this contract of partnership upon July 31st of such year, provided, however, the parties may dissolve said partnership by mutual consent at any time."

Article Sixth of the agreement provided that at the end of each fiscal year "during the continuance of this co-partnership" a general account should be taken for the purpose of ascertaining the net gains for the preceding year, and that such net gains should be distributed in proportion to the interest of each partner (R. 41). Article Ninth of the agreement provided (R. 44) that in the event of dissolution of the partnership in any manner the assets should be applied to the payment of debts, to the return of the capital, and then to the distribution of the profits.

Following the decedent's death on December 16, 1933, the business of the partnership was continued by the surviving partners, and actual liquidation under the provisions of Article Ninth did not occur until some time during 1934 (R. 21, 23). The Board's findings clearly show that the business of the partnership was not wound up on December 16, 1933, nor at any time during the calendar year 1933, for the business of the partnership was continued under the same name by the surviving partners (R. 21); it was not until January 30, 1934, that the audit of the affairs of the partnership for the period August 1 to December 16, 1933, was concluded (R. 21); liquidation of the partnership was not commenced until some time early in 1934 (R. 23); and the winding up of the affairs of the partnership was not completed before February 5, 1934, when the executors of the decedent's estate received the last payment on account of the decedent partner's interest in the firm (R. 23).

The controlling provisions of the New York Partnership Law support the conclusion that the death of the decedent did not terminate the "taxable year" of the partnership. Sections 60 and 61 provide as follows (Laws of 1919, Chapter 408):

"§60. Dissolution defined. The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

§61. Partnership not terminated by dissolution. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

Section 62 sets out the causes of dissolution of a partnership and provides in part that—

"Dissolution is caused:

* * * (4). By the death of any partner;"

The distinction in the New York Law between "dissolution" and "termination" of a partnership is derived from the Uniform Partnership Act (See Sections 29, 30, 7 U. L. A. 43). Commenting upon this distinction, the framers of the Uniform Partnership Act stated (7 U. L. A. 43):

"It is also frequently said that dissolution, although the word is used to designate only the termination of ordinary business relations, terminates the partnership, it being at the same time explained that the partnership thereafter continues to exist for the purpose of suing and being sued in the process of winding up partnership affairs. Certainty demands that this confusion should be removed if possible. *In this act dissolution designates the point in time when the partners cease to carry on the business together;* termination is the point in time when all the partnership affairs are wound up, winding up, the process of settling partnership affairs after dissolution." (Italics supplied).

The decisions under the Uniform Partnership Act clearly establish that the partnership as such continues to exist after dissolution for the purpose of collecting its debts, paying its liabilities, distributing its assets, and performing its antecedent engagements. It can sue and be sued as a part-

nership. Its contractual obligations continue and the surviving partners may bind the estate of the deceased partner in connection with the winding up of the business. *Kennedy* v. *Porter,* 109 N. Y. 526, 17 N. E. 426; *Bayer* v. *Bayer,* 215 App. Div. 454, 214 N. Y. Supp. 322; *Bell* v. *Porter,* 261 Mich. 97, 246 N. W. 93; *Cohen* v. *Swartz,* (1932) 104 Pa. Super. Ct. 414, 159 A. 54; *Shapira* v. *Budish,* (1931) 275 Mass. 120, 175 N. E. 159; *Stewart* v. *Angle,* (1934) 315 Pa. 135, 172 A. 898; *In re Heller's Estate,* (1935) 319 Pa. 135, 178 A. 681.

While the Court below purported to recognize a difference between "dissolution" and "termination" of the partnership, it said:

> "As a continuing source of income to the decedent, it [the partnership] ceased to exist when he died."

As a matter of fact, this was not so for the decedent actually realized income from contracts entered into before his death which were not liquidated until after he died (R. 65, 81). The confusion of the Court below is even more apparent, however, when we consider that affiliation with another corporation does not terminate the taxable year of a corporation, *Helvering* v. *Morgan's Inc.,* 293 U. S. 127; even after dissolution of a corporation its taxable year continues, *Smith* v. *Commissioner, supra,* and in the case of the death of an individual his accounting period is not terminated and the tax is computed as if the return were for a period of 12 months. *Bankers Trust Co.* v. *Bowers, supra.* There is no more reason for requiring the termination of the taxable year of a partnership upon its dissolution than there is in the case of the dissolution of a corporation, for in both cases, after liquidation, the only business carried on is in connection with liquidation. The Court below did not explain this strange inconsistency in its opinion.

In substance, the Court below refused to give effect to the provisions of the New York Law or to the Uniform Partnership Act making a real distinction between "dissolution"

and "termination" of a partnership. By holding that the partnership "ceased to exist" and holding that its taxable year terminated, the Court attributed to *dissolution* of the partnership the same effect as a complete *termination* and winding up of the partnership affairs.

It is clear from the New York statute that the partnership itself was not terminated by the dissolution caused by the death of the decedent, but continued in existence for the purpose of liquidation, which did not occur until 1934. Since the decedent's death did not result in the termination of the partnership itself prior to actual liquidation, why then should it result in the termination of the partnership's "taxable year" prior to actual liquidation? After dissolution and prior to liquidation, items of income may be collected, as they were in the present case*, debts may be paid and losses sustained, all relating to the business prior to dissolution. Such post-dissolution items relating to business prior to dissolution must certainly be taken into account before there can be any accounting to the decedent's estate or among the surviving partners.

Moreover, the decision of the Court below violates the basic tenet of the income tax law that income taxes are assessed on the basis of a 12-month period, for under its decision the decedent and the surviving partners are required to include in their returns for one taxable period their income from the partnership for a period of 16½ months, thus forcing them into the higher surtax brackets. From the very beginning the income tax laws have provided for the assessment of taxes upon the basis of a 12-month period. *Helvering* v. *Morgan's Inc.*, 293 U. S. 127; *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359. So inherent in the law is the principle

---

* Thus certain commissions were earned by the partnership between August 1 and December 16, 1933, but were not collected until the contracts were liquidated after the death of the decedent (R. 65). These commissions grew out of business undertaken prior to dissolution of the firm on December 16, 1933, yet the Commissioner has not protested the exclusion of the decedent's share of such commissions from his 1933 income (R. 81).

of a 12-month period for computing income that the statute and regulations require the Commissioner's consent to changes in accounting periods which would result in returns being filed for more or less than the 12-month period (See Section 46 of the Revenue Act of 1932, *infra*, p. 20). It is no answer in the instant case, as asserted by the Circuit Court, to say that its decision does not subject the decedent and the surviving partners to tax in one period upon *their* income for more than a 12-month period, since the partnership is not the taxpayer. The partnership was not a separate taxable entity; for tax purposes the income of the partnership was the income of the individual partners. *Bull* v. *United States*, 295 U. S. 247, 254.

POINT II.

The consistent judicial and administrative construction of Section 182(a) has received the implied approval of Congress.

As early as 1926 the identical question here involved was considered and decided directly contrary to the decision of the Court below. *Archbald* v. *Commissioner*, 4 B. T. A. 483 This decision was acquiesced in by the Commissioner in 1927 (Cum. Bulletin VI-1, p. 1), and followed by his General Counsel in the same year. (*General Counsel's Memorandum*, 2308, Cum. Bulletin VI-2, p. 229). In 1930 the Board followed its decision in the *Archbald* case in *DeRoy* v. *Commissioner*, 19 B. T. A. 452 and again the Commissioner acquiesced (Cum. Bulletin IX-2, p. 2). Similarly in *Tooke* v. *Commissioner*, 17 B. T. A. 690 (1929), and in *Reynolds* v. *Commissioner*, 17 B. T. A. 693 (1929), both acquiesced in by the Commissioner Cumulative Bulletin IX-1, pp. 46, 51, it was held that the dissolution of a partnership does not terminate its accounting period.

Following this construction of Section 182 (a) in the *Archbald* case, and in *General Counsel's Memorandum* 2308, Congress, in the subsequent Revenue Acts, re-enacted the Section without amendment. It is an established principle that the repeated re-enactment by Congress of a statute after uniform administrative and judicial construction constitutes implied legislative recognition and approval of such administrative and judicial construction. Thus in *Heald* v. *District of Columbia,* 254 U. S. 20, this Court stated that it is the "settled rule" that:

> "* * * where provisions of a statute had previous to their re-enactment a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary."

To the same effect, see *Helvering* v. *Bliss,* 293 U. S. 144, 151; *Old Mission Portland Cement Co.* v. *Helvering,* 293 U. S. 289. The decision of the Court below was a clear violation of this "settled rule" of statutory construction.

CONCLUSION.

This case is pecularly appropriate to the granting of a writ of certiorari. For the first time, a Court has subjected an individual to a tax upon more than a year's income, although the keystone of the tax structure is a 12-month tax-computing period. The question is of wide importance to all business conducted under the partnership form. The decision of the Circuit Court is in conflict with decisions of this Court and with the consistent judicial and administrative construction of the statute which received the implied approval of Congress by subsequent enactment of the applicable statutory provisions without change. The decision conflicts with the New York Partnership Law and the Uniform Part-

nership Act. It creates uncertainty among individuals, partnerships and corporations as to what is the "taxable year", the premature termination of which may result in additional tax burdens. This uncertainty can be dispelled only by a decision of this Court.

WHEREFORE, it is respectfully prayed that a writ of certiorari should issue.

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August 10, 1937.

APPENDIX.

The Statutes Involved.

Section 182 (a) of the Revenue Act of 1932 (47 Stat. 169, 222) provides as follows:

> "There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year."

Section 48 of the Revenue Act of 1932 (47 Stat. 169, 187) provides as follows:

> "When used in this title—
>
> (a) TAXABLE YEAR.—'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. 'Taxable year' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1932, shall be the calendar year 1932 or any fiscal year ending during the calendar year 1932."

Section 189 of the Revenue Act of 1932 (47 Stat. 169, 223) provides as follows:

> "Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net in-

come if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners."

Section 41 of the Revenue Act of 1932 (47 Stat. 169, 185) provides as follows:

"The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year."

Section 42 of the Revenue Act of 1932 (47 Stat. 169, 185) provides as follows:

"The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period."

Section 46 of the Revenue Act of 1932 (47 Stat. 169, 186) provides as follows:

"If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the provisions of section 47."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 301.

GUARANTY TRUST COMPANY OF NEW YORK,
Executor, Estate of Lamar L. Fleming, deceased,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

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GUARANTY TRUST COMPANY OF NEW YORK, Executor, Estate of Lamar L. Fleming, deceased, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	No. 301.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinions below, jurisdiction and Statutes and Regulations involved.

The opinions of the Board of Tax Appeals and the Circuit Court of Appeals (R. 37 and R. 57) are reported in 34 B. T. A. 384 and 89 F. (2d) 692, respectively.

The judgment of the Circuit Court of Appeals was entered on May 10, 1937 (R. 60). A petition for a writ of certiorari was filed August 10, 1937, and was granted October 11, 1937. The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

The Statutes and Regulations involved are set forth in an Appendix, *infra*, pages 26-28.

Statement of the Case.

The case is an income tax case arising under the Revenue Act of 1932. The Commissioner found a deficiency of $39,874.31 (R. 6). An appeal was filed with the Board of Tax Appeals, which held the deficiency unwarranted and, since in the meantime the petitioner had made certain payments on account of the deficiency, found an overpayment of $37,888.89 (R. 48). The Circuit Court of Appeals for the Second Circuit reversed the Board and upheld the Commissioner (R. 57). The case is here on petition for certiorari, granted October 11, 1937 (R. 61).

The Question Presented.

The decedent died December 16, 1933. At the time of his death he was a member of a partnership whose fiscal year ended July 31, 1933. In the decedent's prior-to-death income tax return, the petitioner included the decedent's distributable share of the partnership income for the fiscal 12 months' period ending July 31, 1933. The single question presented is whether, in addition, there should have been included the decedent's share of the partnership income for the 4½ months' period between August 1, 1933, and December 16, 1933.

The Statement of Facts.

The case was tried upon the petition and answer (R. 2, 10) and a stipulation of facts with Exhibits attached (R. 11). In stating the facts, we shall follow closely the findings of facts made by the Board, elaborating only where necessary.

The decedent, Lamar L. Fleming, died December 16, 1933. For a number of years prior to his death he was a member of the partnership of Anderson, Clayton & Fleming, with its

principal place of business in New York City and branches in other cities of the United States and Europe (R. 11, 38).

The business of the partnership was operated on the cash receipts and disbursements basis, and a fiscal year ending July 31 of each year (R. 12, 38). The decedent likewise was on the cash receipts and disbursements basis, but kept his accounts and made his tax returns on a calendar year basis (R. 11, 38).

The partnership was formed in 1918. It was engaged in the buying and selling of cotton, the handling of foreign exchange, and the conducting of financing operations incidental to the cotton business (R. 11). The successive partnership agreements under which it has operated provided for a fiscal year ending July 31 (R. 19, Ex. A). On August 1, 1933, a new partner was admitted to the firm and a new partnership agreement was made, which was identical with the previous one, except as to the division of the profits (R. 12, 38). Thus the partnership articles executed August 1, 1933 (R. 23, Ex. B) provided:

> "Third. The co-partnership hereunder shall commence as of August 1, 1933, and shall continue until July 31, 1934 (hereinafter sometimes called 'the fiscal year'), and shall be deemed to have been continued and extended from year to year thereafter, unless any one of the parties hereto shall give notice in writing, not less than thirty days prior to July 31st of any year, of intention to terminate this contract of partnership upon July 31st of such year * * *."

On account of this fiscal year basis, the articles also provided (R. 25, Ex. B):

> "Sixth. At the end of each fiscal year during the continuance of this co-partnership, for the purpose of ascertaining the net gains and profits for the preceding year, a general account shall be taken and stated by the partners of all the money, claims, assets, * * *."

Then follows the percentages of the several partners, the decedent's share being 32.5%.

In accordance with the contract of partnership, an account was taken at the end of the fiscal year July 31, 1933, and decedent was notified of his share of the profits for the preceding 12 months. A large portion of his share was allowed to remain to his credit with the partnership (R. 12, 38). No part of the earnings of the partnership for the period between the end of the fiscal year July 31, 1933, and his death was paid to or received by the decedent or by his executors during the calendar year 1933 (R. 14, 39). The partnership agreements provided for but one yearly accounting and settlement, which was at the end of the fiscal year (R. 42).

After the decedent's death the business of the partnership was continued under the same name by the surviving partners (R. 12, 39). An audit of the partnership accounts for the period August 1, 1933, to December 16, 1933, was made, but was not completed until January 30, 1934. Liquidation of the partnership was commenced early in 1934 (R. 14). On or about January 9, 1934, decedent's executors received in partial distribution and liquidation of the partnership an amount which consisted of the capital invested by the decedent, the credit balance on deposit due decedent, and decedent's share of the profits of the partnership between the end of its fiscal year July 31, 1933, and decedent's death, December 16, 1933 (R. 14, 39).

In February, 1934, decedent's executors received a final distribution of $15,067.39 and interest of $82.56 (R. 14, 39). The sum of $15,067.39 included an item of $13,894.74 constituting the decedent's share of certain "open" commissions, i.e., commissions upon purchases and sales of cotton for future delivery made prior to the decedent's death but which, due to a recognized trade practice, were not in fact received until 1934 (R. 13, 14, 39).

In May, 1934, the surviving partners entered into a new partnership agreement, taking over the firm's business as of December 18, 1933 (December 17 being a Sunday), and providing for a fiscal year ending July 31, 1934, and from year to year thereafter (R. 12-13, 39).

Decedent's executor duly filed an income tax return for the period January 1 to December 16, 1933, the date of his death, and included therein his distributive share of the profits of the partnership for the fiscal year ending July 31, 1933 (R. 14, 39). The executors did not include (1) the decedent's share of the profits of the partnership for the 4½ months' period between July 31, 1933, the end of the fiscal year, and the date of decedent's death; (2) the decedent's share of the open commissions earned during that period but not collected until the following year; nor (3) the interest on the decedent's capital investment in the firm and on the decedent's credit balance. These items were all determined by the post-death firm audit completed January 30, 1934 (R. 13, 39).

In determining the deficiency, the respondent added to the decedent's share of the firm income reported in the return the sum of $63,494.46, representing the decedent's share of the partnership profits for the 4½ months' period between July 31, 1933, and December 16, 1933, and $5,559.19 interest (R. 15, 39). The item of $63,494.46 was made up of the decedent's share of the cash earnings of the partnership and the earned but uncollected commissions during the 4½ months' period. The item of $5,559.19 consisted of the interest on the decedent's capital investment and credit balance for the 4½ months' period and $50 from some other source (R. 15, 39-40). The effect of adding these items to the income already reported was to include in the decedent's prior-to-death return his share of the firm's profits over a period of 16½ months.

The executors of the estate of the decedent duly filed an estate tax return, which included decedent's credit balance with the partnership, his capital interest therein and his share of the profits earned during the period August 1 to December 16, 1933, and paid the estate tax thereon (R. 16, 40). Upon the audit of the estate tax return so filed, the value of the decedent's interest in the firm as reported was accepted by the Treasury (R. 16-17).

On February 28, 1934, the survivors of the partnership filed a return for it in liquidation captioned "Fiscal year beginning August 1, 1933, and ended December 16, 1933;" and on October 28, 1934, they filed a return captioned "Fiscal year December 17, 1933, to July 31, 1934." Both of these returns were made without permission or direction of the Commissioner (R. 17, 40).

On or about March 5, 1935, the executor of the estate of the decedent waived the restrictions upon the assessment of $37,917.39 out of the total deficiency in tax of $39,874.31 determined by the Commissioner, and paid into the Treasury such amount, reserving the right to prosecute the pending appeal and to recover as an overpayment any amount which might be found to be due under the final decision of the Board herein (R. 17, 40).

In his petition of review filed with the Circuit Court of Appeals, the respondent did not take exception to the Board's ruling excluding from income (1) the decedent's distributive share of the so-called "open" commissions earned prior to but not collected until after the decedent's death (i.e. $13,894.74), or (2) the interest on decedent's firm capital and credit balance between July 31, 1933, and December 16, 1933 (i.e. $5,509.19), thus acquiescing in the Board's ruling in respect of these two items (R. 49).

With the Commissioner's original addition to income from partnership profits of $63,494.46 (Deficiency Notice, R. 6) and the elimination of the two above items acquiesced in, the additional income now in controversy amounts to $49,599.72.

The Errors Alleged.

1. The Circuit Court of Appeals erred in holding that the amount of $49,599.72 representing the decedent's share of the partnership profits from August 1, 1933, to December 16, 1933, was taxable income to the decedent.

2. The Circuit Court of Appeals erred in failing to hold that the decedent's taxable income from the firm in 1933 was limited to his distributive share of the firm profits for the 12-month fiscal period ended July 31, 1933.

3. The Circuit Court of Appeals erred in holding that the death of the decedent terminated a second "taxable year" of the firm, thus throwing some 16½ months' firm income into the 1933 income tax return of the decedent and the eight surviving partners.

ARGUMENT.

Preliminary Statement.

The respondent in the Board and in the court below predicated his argument on the assertion that unless the disputed item of income was included in the prior-to-death income tax return, such income would escape the income tax altogether. This begs the entire question, for it assumes that the provisions of the statute were drawn with a view of taxing all items of income, regardless of Congressional policy. In urging the argument, the respondent wholly overlooks the structure of the taxing acts as they existed when this case arose.

Let us approach the problem uncomplicated by the circumstance that the decedent on death was a member of a partnership with a fiscal year. Take the ordinary case of a decedent on the cash and calendar year basis who died within the year. In such a case, three returns are required, a prior-to-death income tax return, an estate tax return, and a post period executor's income tax return. Prior to the Revenue Act of 1934, the rules covering such returns were perfectly clear. In the prior-to-death income tax return there must be included the income *actually received* within the calendar year and prior to the death; there was not included items of accrued income, i. e. earned but *not* received

(such as unpaid commissions, unpaid professional fees where the work had been performed and the like). But such unpaid items did not escape taxation, for the value of such items must be included in the estate tax return and tax paid thereon. In the post-death income tax return, the executors included income actually received since the date of death, not including the receipts on account of services rendered prior to death, for such receipts were already taxed in the estate tax return.

So far as we are aware, the Treasury has recognized and invariably enforced these rules, so that they have become the recognized policy of Congress. There is an early income tax ruling, II Cum. Bul. 1 p. 151 (1923), in which the Department said:

> "If the decedent was alive at the time the payment was made upon the day of his death the amount paid is his income. On the other hand, if the decedent had died before payment was attempted to be made, it is obvious, where the decedent is on the receipts and disbursements basis, that this amount was not income to him during his life because never received by him."

In *Nichols* v. *United States*, 64 Ct. Cl. 241 (1927—arising under the Revenue Act of 1918), the Government was attempting to tax as income in the executor's post-death return an item of income earned prior to but not received until after the death. As stated in the court's opinion (p. 246), the Government, during the course of the case, formally conceded that the decedent, since on a cash basis, did not realize any income on account of the item, but argued that it was income to the executor. The court held that on the Government's concession the income was not income in the prior-to-death return and that since the amount of the item had been included in the estate tax return and an estate tax paid thereon, it was not subject to income tax in the executor's post-death return.

This was the state of the law when the decedent herein died.

In the Revenue Act of 1934, a material change occurred. In Section 42 of that Act appeared a new provision reading:

> "In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period."

The respondent maintained below that this provision was merely a "clarification of existing law" and applicable in the instant case. This clearly is not the case. See *Nichols* v. *United States, supra.* Any doubt that the 1934 Revenue Act changed the law is definitely put at rest by the Senate and House Reports accompanying the 1934 Revenue Bill. See Report of Sub-Committee of the Ways & Means Committee of the House, Dec. 4, 1933, p. 15*; Report of the House Ways & Means Committee H. Rep. No. 704, 73d Congress, 2d Sess. p. 24.

On this aspect of the case, the Board in its decision herein stated (R. 46):

> "Respondent refers to section 42 of the Revenue Act of 1934 as a 'clarification of existing law.' We disagree with that construction. That provision, in our judgment changed the law. Nichols v. United States, 64 Ct. Cls. 241; Report of the Ways and Means Committee, p. 24, H. R. No. 704, 73d Cong., 2d sess."

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* The Report in part stated:

"Your subcommittee recommends adding to the first of these sections a provision requiring the income-tax return of a decedent to include amounts of income accrued up to the date of his death regardless of the fact that he may have kept his books on the cash basis. In the case of the second of these sections, a provision should be added allowing deductions to be likewise accrued.

"Since the courts have held that income accrued by a decedent prior to his death is not income to the estate, it follows that unless such income is taxable to the decedent it will escape income tax altogether. For the same reason, unless expenses which accrued prior to death are allowed to the decedent, they cannot be used. The recommendation made by the sub-committee *remedies* these defects."

The Circuit Court below did not refer to the Revenue Act of 1934, or place any reliance on Section 42 thereof.

It is significant that the Government, while asserting that Section 42 of the 1934 Act was a mere clarification of the law, itself has definitely repudiated any such position, for in its petition of review it expressly stated that it did not take exception to the Board's ruling excluding from income the decedent's distributive share of the so-called "open" commissions, or the interest on the decedent's firm capital or credit balance between July 31, 1933, and December 16, 1933 (R. 49), both of which items certainly are "accrued" items within the meaning of Section 42 of the 1934 Revenue Act.

POINT I.

The decision of the Court below violates the basic tenet of our income tax laws that income taxes are assessed upon the basis of a twelve-month period, never longer, although sometimes shorter.

From the enactment of our first revenue Act onward, our income tax laws have invariably provided for the assessment of income taxes on the basis of a twelve-month period, never longer. The Revenue Act of 1932 is illustrative of this and prior Acts. Section 41, entitled "General Rule", provides:

> "The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; * * *. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year."

Section 48, entitled "Definitions", provides:

> "(a) TAXABLE YEAR.—'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. 'Taxable year' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1932, shall be the calendar year 1932 or any fiscal year ending during the calendar year 1932.
>
> (b) FISCAL YEAR.—'Fiscal year' means an accounting period of twelve months ending on the last day of any month other than December.

And so also in many other sections covering the period of making returns, whether corporate or individual, estate or partnership.

This Court time and again has recognized this rule as one of the basic principles of our tax laws. *Helvering* v. *Morgan's Inc.*, 293 U. S. 121 (1934); *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359 (1931). In the *Morgan's Inc.* case this Court said that all of our Revenue Acts since 1917—

> "have uniformly required the taxpayer's returns to be made on the basis of the twelve months' accounting period shown by the taxpayer's books, whether it be the calendar year or a different fiscal year."

Under certain circumstances, provision is made for making returns for *less* than a twelve-month period, but so inherent in the law is the principle of a twelve-month period that the statute and the Commissioner's Regulations expressly require the Commissioner's approval before authorizing a return for less than twelve months. See Section 47 of the 1932 Revenue Act and Regulations 77, Art. 371, issued thereunder.

So far as we are aware, the statute and the Regulations contain not a word indicating, directly or indirectly, that

returns under any circumstances shall include more than a twelve-month period.

The Board of Tax Appeals in its decision below fully recognized these considerations. It said in part (R. 43):

> "To sustain respondent and include in decedent's taxable income, for the period prior to his death, the partnership income earned between July 31, 1933, the end of the partnership's fiscal year, and December 16, 1933, the date of decedent's death, would require our violation of the basic tenet of income tax law that such tax is assessed on the basis of a period of 12 months. See Helvering v. Morgan's, Inc., 293 U. S. 121; General Machinery Corporation, 33 B. T. A. 1215. The Revenue Act of 1932, section 47, specifically provides for 'Returns for a period of less than twelve months'. See also section 48(a) supra. The statute does not include a provision permitting returns for a period of more than twelve months."

The Circuit Court below went directly counter to this. The clear effect of its decision is to require the inclusion in one return of income over a period of 16½ months, in respect not alone of the decedent but of the surviving partners as well. If the partnership had been on a fiscal year basis ending January 31, 1933, the effect of the decision would have been to include in one return income received over a period of almost 23 months—well nigh two years. For a partnership is not taxed as a separate taxable entity; the income of the partnership is the income of the partners. See Section 181 *et seq.* of the Revenue Act of 1932 and Regulations 77, Articles 901 *et seq.* issued thereunder.

Perhaps the greatest vice of such a position as that for which the respondent contends is its effect on the rate of surtax. For example, by including the decedent's share of the partnership profits for 16½ months, the decedent's surtax rate is raised from 29% (applicable as the return was filed) to 50% under the Commissioner's determination. Surely Congress should not be taken to have intended any such incon-

gruous and discriminatory result, without clear and convincing language so indicating.

The Circuit Court below seems to have realized the weight of the argument and endeavored to counter by asserting that income for only a twelve-month period would be included in the prior-to-death return. But its reasoning is specious. After expressly saying that "a partnership is not a taxpayer" and adding that the death of the decedent terminated a second taxable year within 1933, the Court continued (R. 59):

> "Of course this made two 'partnership taxable years' end in one taxable year of the decedent. Yet that did not make his taxable year include his income for more than twelve months. It did, indeed, include his share of partnership income for more than a twelve-month period, but that is immaterial since the partnership is not the taxpayer."

If the decedent, as a partner, was nevertheless the taxpayer, i.e. the individual who in his individual capacity earned his share of the firm income, then the firm income is his income, and the inclusion in the decedent's prior-to-death return of his share of the firm income for the full year ended July 31, 1933, and for the period August 1, 1933, to December 16, 1933, definitely throws into one return income attributable to the decedent for a full 16½ months' period. There is no escape from this conclusion.

The case of *Bull* v. *United States,* 295 U. S. 247 (1934), cited by the Court below, is not in point, for there the partnership and the partner were both on the calendar year basis, so that there was no question of including in the final return income for more than a twelve-month period.

POINT II.

Section 182(a) of the 1932 Revenue Act definitely negatives the rule prescribed by the Court below, for the section contemplates the inclusion in the prior-to-death return of partnership income for not more than one partnership period.

Section 181 imposes the tax in respect of partnership income squarely upon the partner and in his individual capacity for it provides:

> "Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity."

Section 182(a) prescribes *in what period* the partnership income shall be taxed to the individual partner. The section provides:

> "(a) General Rule. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for *any* taxable year of the partnership ending within his taxable year."

Thus the general rule is that the partner shall include as his income his share of the "net income" of the partnership "for the taxable year" of the partnership. Now it is essential to fix the period which constitutes the taxable year for, while the net income is the income of and taxable to the partners, it can be computed only on the basis of the gross income and the allowable deductions of the partnership.

Partnerships are often on a fiscal as distinguished from a calendar year, and may keep their books either on a cash

or on an accrual basis, while individuals are usually on a calendar year and a cash basis. So it is necessary to make provision for the case where the partnership "net income" is computed on one basis, while the partner is on another basis. Bearing in mind the cardinal principle of our income tax laws that an individual should not be taxed on income over more than a twelve-month period, and the grave discrimination which would arise under the graduated surtax rates if such were done in the case of partnerships and only in the case of a partnership, Congress very carefully avoided any such result by adding the second sentence when formulating Section 182(a). If, said Congress, the taxable year of the partnership and the partner differ, then the partnership income taxable to the partner shall be the income of the partnership "for *any* taxable year of the partnership ending within" the partner's taxable year.

The word "any" usually connotes the singular, although where the context requires it, it may include the plural. But as used in the second sentence of Section 182(a), certainly the context does not require a plural meaning. If Congress had so intended it, it would have been quite simple to use the phrase "for any taxable year *or years*". When we consider the scrupulous care of the law to impose taxes on periods never in excess of twelve months, it seems clear that Congress definitely used the word "any" in its singular sense, and intended that the net income of the partnership for only *one* taxable year of the partnership ending within the partner's taxable year should be included in the return of the partner.

This in fact is the interpretation which the Commissioner has put upon the second sentence of Section 182(a) in the Regulations issued under such section. Article 902 of Regulations 77 provides:

> "*Distributive shares of partners.*—The distributive share of the net income of the partnership which a partner is required to include in his return is his proportionate share of the net income of the partnership, either—

(a) For the taxable year upon the basis of which the partner's net income is computed,

or

(b) If the partner's net income is computed upon the basis of a taxable year different from that upon the basis of which the net income of the partnership is computed, for *the* taxable year of the partnership ending within the taxable year upon the basis of which the partner's net income is computed.

Amounts earned and distributed to a partner by a partnership after the end of its taxable year and before the end of his corresponding taxable year should be accounted for both by the partnership and by the partner in their returns for their next succeeding taxable years. * * *"

Now the word "the" very obviously is the singular. The Regulations thus clearly contemplate the inclusion in the partner's income of *only one* partnership period income. If there be any doubt concerning the intent of Section 182(a), which we submit there cannot be for the language is simple and succinct, certainly this administrative interpretation of the section in Article 902 of the Commission's Regulations must dispel the doubt.

POINT III.

The death of the decedent did not terminate the partnership's "taxable year" and so create a "second" partnership taxable year ending within the decedent's calendar year, as the Court below held.

In view of the explicit language of Section 182(a), the respondent is forced to maintain that the death of the decedent on December 16, 1933, terminated a second taxable year of the partnership within the period of the decedent's prior-to-death return. If this did not occur, the respondent's case

must inevitably fall. The Board, following a long line of earlier decisions, held that the death of the decedent did not so terminate a second taxable year. The Court below held that it did.

The argument is a curious one. The firm of Anderson, Clayton & Fleming is a New York partnership and so subject to the provisions of the New York Partnership Law, which follows substantially the Uniform Partnership Act. Under Section 62 of the New York Act, the death of a partner causes "the dissolution" of the partnership. But "dissolution" is not "termination". Thus Sections 60 and 61 provide:

> "Sec. 60. *Dissolution defined.*—The dissolution of a partnerhip is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.
>
> "Sec. 61. *Partnership not terminated by dissolution.* —On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

Nevertheless, said the Court below, although the partnership was not terminated on the decedent's death—"As a continuing source of income to the decedent, it ceased to exist when he died."

This is a rather metaphysical distinction. Certainly under the New York Partnership Act, the firm did not cease to exist; it definitely continued in existence "until the winding up of the partnership affairs is completed". This, according to the stipulation of facts and the findings of the Board, did not occur until some time in February, 1934 when the final distribution was made (R. 14, 39). In point of fact, the firm continued to operate and carry on business as before well into 1934, for it is stipulated and found by the Board as a fact that—"Following the decedent's death on December 16, 1933, the business of the partnership was con-

tinued under the same name by the surviving partners" (R. 12, 39), and the "Liquidation of the partnership was commenced early in 1934". These considerations definitely negative the termination or end of the partnership when the decedent died. The only reason that the death terminated the continuance of the decedent's income from the firm was that he was on the cash basis and death prevented any further "receipts" by the decedent. But this did not affect the continuance of the activities of the *partnership* as such.

It is true that following the death an audit of the partnership accounts was made from the end of the last fiscal year until the date of death. But this accounting was not the annual accounting required by the firm articles on July 31 of each year. It was an accounting simply for the purpose of determining the rights of the estate and necessary in order to pay off the estate and permit the estate to make the necessary estate tax return. In respect of the surviving partners, the partnership continued. Certainly as to such partners, the partnership taxable year remained the same after as before the death of the decedent. The death was purely adventitious, so far as they were concerned. But if the partnership taxable year continued as to the surviving partners, it could not have terminated in respect of the decedent. Where the partnership agreement fixes the partnership taxable year as the fiscal year ending July 31, 1933, the partnership taxable year continues, we submit, regardless of the intervening death of a partner, until the end of the current fiscal year, or, where liquidation is completed prior to the end of the fiscal year, certainly until liquidation is completed. This did not occur here until February 1934 (R. 14, 39).

In the case of a corporation, the act of dissolution (as distinguished from final liquidation) has never been held to terminate or shorten the corporation's taxable year, whether the corporation is on the cash or the accrual basis, or whether on the calendar year or fiscal year basis. One return

and only one return is required for the full year, and if the act of dissolution occurs prior to the end of the accounting period, the trustees in dissolution must prepare and execute the return, and must include all items of gross income and deductions arising in the full year's period. *Mrs. Grant Smith* v. *Commissioner*, 26 B. T. A. 1178 (1932); *Elgin Compress Co.* v. *Commissioner*, 31 B. T. A. 272 (1934); *Pittsburgh & West Va. Ry. Co.* v. *Commissioner*, 32 B. T. A. 66; *Forest Glen Creamery Co.* v. *Commissioner*, 33 B. T. A. 564 (1935); *Palomas Land & Cattle Co.* v. *Commissioner*, 33 B. T. A. 999 (1935); G. C. M. 2080, C. B. VI-2, p. 288. Thus in the *Smith* case the Board said:

> "* * * But, where a corporation is dissolved during a particular calendar year and its affairs remain in the hands of liquidating trustees for the remainder of the year, we know of nothing in the applicable revenue act and the Commissioner's regulations thereunder which warrants dividing up the calendar year into two taxable periods, viz., the first period covering the time prior to the date of dissolution of the corporation and the second period covering from the time when trustees in liquidation took charge to the end of the calendar year."

This Court in *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, has held that even though within the year the taxpayer corporation became affiliated with another corporation and even though two returns were filed for the full year period, nevertheless the taxable year of the taxpayer corporation was not terminated for income tax purposes.

Similarly, in the case of an individual, his death within the twelve-month period does not terminate the taxable year. *Bankers Trust Co.* v. *Bowers*, 295 F. 89. There the Circuit Court for the Second Circuit said (p. 92):

> "* * * The fundamental scheme of title 2 of the Revenue Act is for a tax upon the net income of the taxpayer during an accounting period of 12 successive months. This general accounting period seems to be a predeter-

> mined measure to be applied to a taxpayer as income, and is not affected by his death or change of status within the period. The tax is imposed upon the entire net income for such period, and the return of such income constitutes his return for the period of 12 full months, even though he may have lived only a portion thereof."

Whether it be a corporation, an individual or a partnership, the reason for the rule is quite apparent. In Section 48 (see Appendix), the statute contains a general definition of the "taxable year". This definition is applicable among all classes of taxpayers, corporate, individual, partnership or estate. It provides that the "taxable year" *means* (not includes) the calendar year, or the fiscal year ending during such calendar year *upon the basis of which the net income is computed under this Part*" (Italics ours). The section contemplates returns for a fractional part of a year, but only where the law or the Regulations provide for such returns. This provision of the statute covers cases where there is a change from a calendar year to a fiscal year or from one fiscal year to another, and such a change is made conditional on the Commissioner's approval. See Sections 46 and 47. In the circumstances here presented, neither the law nor the Regulations provide for a partnership return for a fractional part of a year. There is nothing here which justifies the contention that the death of a partner terminates the taxable year of the partnership.

Indeed, in the entire gamut of the Income Tax Acts, there is only one instance where the taxable year may be shortened by termination. This is where the Commissioner finds that the taxpayer is about to depart from the United States, and the collection of the tax is endangered. See Section 146.

In view of the universal use of a full twelve-month period as the basis for reporting income, surely somewhere in the Act Congress would have provided in clear terms for the termination of the partnership year on the death of a partner if it had so intended.

The Board below, quoting from an earlier decision where the facts were identical (except for the fiscal year date), said (R. 43):

> "It seems clear to us that the death of a partner does not shorten the partnership's fiscal or calendar year to an accounting period terminating at the death of the partner and that only a complete liquidation during the calendar or fiscal year terminates the accounting period. This partnership has but one accounting period ending in 1920. The statutory net income of the partnership could not in this instance be computed before the close of its fiscal year. This being our view, we must hold that there should be included in the deceased's return of income for 1920 only his distributive share of the partnership net income for its fiscal year ending January 31, 1920."

All the decided cases support the conclusion of the Board in the instant case; none support the decision of the Court below. There are two earlier Board decisions which are squarely in point. *Archbald* v. *Com'r.*, 4 B. T. A. 483 (1926); *DeRoy* v. *Com'r.*, 19 B. T. A. 452 (1930), in both of which the Commissioner has formally acquiesced.* The General Counsel of the Commissioner himself so ruled. G. C. M. 2308, VI-2 Cum. Bul. 229 (1927). In two other cases, the Board has held that the dissolution of a partnership does not terminate the accounting period. *Tooke* v. *Com'r.*, 17 B. T. A. 690 (1929); *Reynolds* v. *Com'r.*, 17 B. T. A. 693 (1929). In both of these cases the Commissioner has formally acquiesced.†

Perhaps the most succinct statement of the reason for the rule is found in the Board's early decision in the *Archbald* case. After saying that the twelve months' accounting period is "one of the cornerstones of our tax structure", the Board said (p. 485):

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* VI-1 Cum. Bul. page 1; IX-2 Cum. Bul. page 16.

† IX-1 Cum. Bul. page 51; IX-1 Cum. Bul. page 46.

> "It is true, of course, that earnings of a partnership are the property of the individual partners as soon as earned. This legal theory has not, however, been applied in the computation of net income for the purpose of taxation. The statute expressly recognizes definite accounting periods for the partnership, for the partner, or for both, and has used the calendar or fiscal year as the measure. Calendar and fiscal years are but twelve-month accounting periods. During the existence of the partnership a partner's taxable income therefrom is not measured by his share of the partnership earnings as they are earned, but, on the contrary, the statute requires that it be measured by his share of its *net income* during its accounting period, *computed at the close of such period,* and this entirely without regard to distribution or ownership. The principle of requiring and permitting the computation of income on the basis of a twelve-month accounting period was strictly adhered to."

The instant case must be distinguished from two lines of cases. In *Bull* v. *United States,* 295 U. S. 247, the partner died within the calendar year. This Court held that the prior-to-death return must include the firm income up to the day of the decedent's death. But the firm and the deceased partner were both on the calendar year basis. The case came squarely under the first sentence of Section 182(a) and involved the inclusion of income for *less*—not more—than a twelve-month period. The case is clearly distinguishable, for wholly different considerations came into play.

Similarly, the Board reached the same result in *Goldman et al.* v. *Com'r.,* 15 B. T. A. 1341. In the *Goldman* case, the Board said (p. 1345):

> "Recognizing the fact that the taxable year of the partnership might be a different year from that of a partner, provision is made to cover such a state of case. In this proceeding, we are not concerned with this question, since the taxable year of the decedent coincides with the taxable year of the partnership."

It is significant that the *Goldman* case was decided after the *Archbald* case and before the *DeRoy* case, and in the instant case the Board cited and followed the *Archbald* and *DeRoy* cases. Clearly the Board felt and feels that the *Goldman* case and cases of that character present a wholly different situation.

Then there are those cases where the partner was on a calendar year basis and the firm was on a fiscal year basis but the partner died *before* and not *after* the end of the partnership fiscal years. There the deceased partner was required to include in the prior-to-death return his share of the income from the partnership up to his death. *Darcy* v. *Com'r.*, 66 F. (2d) 581 (C. C. A. 2d, 1933). But in these cases again there was no question of taxing income over more than a twelve-month period.

The two subsequent returns filed on behalf of the surviving partners, one captioned "Fiscal year beginning August 1, 1933, and ended December 16, 1933," and the other captioned "Fiscal year December 17, 1933 to July 31, 1934" are without significance.

In the first place, as the Board below said (R. 44), under the law a taxpayer cannot file returns for less than a full twelve-month period without the Commissioner's approval and the Commissioner did not approve. Certainly the surviving partners could not alter these requirements, and so the returns were neither authorized nor required. See Section 189 and Article 941 of Regulations 77. Secondly, the interests of a deceased partner cannot be prejudiced by the act of the surviving partners; nor can the act of surviving partners constitute any ground for an estoppel in the case of the deceased partner. Finally, as the Board pointed out (R. 45) any argument based on estoppel must fail since it is not shown that the respondent relied upon any act of the decedent or his surviving partners or his executor, causing detriment to the respondent.

POINT IV.

The judicial and administrative construction of Section 182(a) for which we contend has received the implied approval of Congress.

The *Archbald* case, *supra,* which the Board followed in the instant case, was decided in 1926. As already pointed out, the Commissioner acquiesced in the decision in 1927 and it was followed by his General Counsel in the same year. G. C. M. 2308, *supra.* The *DeRoy* case, *supra,* was decided by the Board in 1930 and acquiesced in by the Commissioner in that year. The cases of *Tooke* v. *Commissioner, supra,* and *Reynolds* v. *Commissioner, supra,* decided in 1929, held squarely that the dissolution of a partnership does not terminate its accounting period, and the Commissioner acquiesced in these decisions. After Section 182(a) had been thus construed by the Board in the *Archbald* case and the later Board cases, and in G. C. M. 2308, Congress re-enacted the section without amendment in the subsequent Revenue Acts. Such re-enactment of the statute constitutes implied legislative approval of the administrative and judicial construction. *Heald* v. *District of Columbia,* 254 U. S. 20 (1920); *Helvering* v. *Bliss,* 293 U. S. 144, 151 (1934); *Old Mission Portland Cement Co.* v. *Helvering,* 293 U. S. 289 (1934).

CONCLUSION.

The decision of the Board below is in accord with the fundamental structure of our income tax statutes; it is in accord with the express requirements of the statute and the Commissioner's Regulations; it avoids the incongruity and unfairness of taxing in one return income realized over as much as 23½ months, with the attendant burden of sub-

jecting such income to surtax rates far in excess of any rate applicable to one year's income; and finally it has the virtue of upholding a rule which has been in effect for upwards of fifteen years, thus insuring uniformity among taxpayers similarly situated.

It is respectfully submitted that the decision of the Circuit Court should be reversed and the order of the Board approved.

Respectfully Submitted,

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APPENDIX.

Revenue Act of 1932, c. 209, 47 Stat. 169, 185, 186, 187, 217, 222:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.

SEC. 48. DEFINITIONS.

When used in this title—

(a) TAXABLE YEAR.—"Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. "Taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1932, shall be the calendar year 1932 or any fiscal year ending during the calendar year 1932.

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

SEC. 182. TAX OF PARTNERS.

(a) General rule. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year.

New York Partnership Act, Laws of 1919, c. 408:

SEC. 60. Dissolution defined.— The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

SEC. 61. Partnership not terminated by dissolution.— On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

SEC. 62. Causes of dissolution.— Dissolution is caused:

* * * * * * *

4. By the death of any partner;

* * * * * * *

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 371. Returns for periods of less than 12 months.— No return can be made for a period of more than 12 months.

* * * * * * *

The return of a decedent or of his estate for the year in which he died is a return for 12 months and not for a fractional part of a year.

ART. 901. Partnerships.— Partnerships as such are not subject to taxation under the Act, but are required to make returns of income. (See section 189 and articles 941 and 942.) Individuals carrying on business in partnership are, however, taxable upon their distributive shares of the net income of such partnership, whether distributed or not, and are required to include such distributive shares in their returns. The net income of the partnership shall be computed in the same manner and on the same basis as the net income of an individual, except that the deduction of contributions or gifts is not permitted, * * *.

ART. 902. Distributive Shares of Partners.— The distributive share of the net income of the partnership which a partner is required to include in his return is his proportionate share of the net income of the partnership, either—

(a) For the taxable year upon the basis of which the partner's net income is computed, or

(b) If the partner's net income is computed upon the basis of a taxable year different from that upon the basis of which the net income of the partnership is computed, for the taxable year of the partnership ending within the taxable year upon the basis of which the partner's net income is computed.

Amounts earned and distributed to a partner by a partnership after the end of its taxable year and before the end of his corresponding taxable year should be accounted for both by the partnership and by the partner in their returns for their next succeeding taxable years.

FILE COPY

No. 301

In the Supreme Court of the United States

October Term, 1937

GUARANTY TRUST COMPANY OF NEW YORK, Executor, etc., Petitioner,

vs.

JOHN T. SULLIVAN, Commissioner of Internal Revenue.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 301

GUARANTY TRUST COMPANY OF NEW YORK, EXECUTOR, ESTATE OF LAMAR L. FLEMING, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 62) is reported in 34 B. T. A. 384. The opinion of the Circuit Court of Appeals (R. 95) is reported in 89 F. (2d) 692.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 10, 1937. (R. 98.) Petition for certiorari was filed August 10, 1937. The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the return of decedent's income for the period from January 1 to December 16, 1933, date of death, should include decedent's share of partnership profits from the end of the partnership fiscal period, July 31, 1933, to date of death, as well as his share of partnership profits for the period ended July 31, 1933.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 11–14.

STATEMENT

Lamar L. Fleming, a member of the partnership of Anderson, Clayton and Fleming, cotton brokers, died December 16, 1933. The firm operated under a partnership agreement, dated August 1, 1930, which expired on July 31, 1933. The agreement provided for the operation of the partnership on a cash receipts and disbursements basis, with the fiscal year ending July 31st of each year. The decedent was also on the cash receipts and disbursements basis, but kept his accounts and made his tax returns on the calendar year basis. (R. 64, 19.)

On August 1, 1933, a new partner was admitted to the firm, and a new partnership agreement was made, which was identical with the previous one, except as to the division of the profits. This agreement provided that the partnership's fiscal year should begin August 1, 1933, and end July 31, 1934. (R. 64.)

After July 31, 1933, decedent was notified of his share of the partnership's profits for the fiscal year ended July 31, 1933. A large portion of his share was allowed to remain to his credit with the partnership. No part of the partnership profits for the period between the end of the partnership's fiscal year, July 31, 1933, and the date of decedent's death, was paid to or received by the decedent. The partnership agreements provided for but one yearly accounting and settlement, which was at the end of the fiscal year. (R. 64–65.)

After decedent's death the business was continued under the same name by the surviving partners, until early in May, 1934, when a new partnership agreement was entered into, taking over the business as of December 18, 1933, and providing for a fiscal year ended July 31, 1934, and from year to year thereafter. (R. 65.)

Shortly after the death of the decedent, an account was taken, covering the period from August 1 to December 16, 1933, and on or about January 9, 1934, decedent's executors received a partial distribution of the profits. In the month of Febru-

ary, 1934, the executors of decedent received a final distribution. (R. 65.)

The executors of the estate filed an estate tax return for the decedent, which included, besides other items, decedent's share of the profits earned during the period, August 1 to December 16, 1933, and paid an estate tax thereon. (R. 66.)

On February 28, 1934, the survivors of the partnership filed a return for it in liquidation for the fiscal year beginning August 1, 1933, and ending December 16, 1933, and thereafter filed a return for the fiscal year, December 17, 1933, to July 31, 1934. Both returns were filed without permission or direction of the respondent. (R. 66.)

Decedent's executors filed his income tax return for the period, January 1 to December 16, 1933, date of his death, and included the decedent's distributive share of the profits of the partnership for the fiscal year ended July 31, 1933, but did not include therein his share of the profits of the partnership earned between July 31, 1933, the end of its fiscal year, and the date of decedent's death, December 16, 1933. (R. 65–66.)

In determining the deficiency, the Commissioner included in decedent's income, partnership profits for the period between July 31, 1933, and the date of decedent's death. (R. 66.) The Board of Tax Appeals held that the inclusion in decedent's income of partnership profits for a period greater than twelve months violated the tenet that income

tax is assessed on the basis of a twelve-month period. (R. 71.) The Circuit Court of Appeals reversed, holding that while the determination included partnership income for more than twelve months, it covered decedent's, the taxpayer's, income for a period of less than twelve months. (R. 97–98.)

ARGUMENT

Petitioner contends for a construction of the Revenue Act of 1932 which would permit a deceased partner's share of partnership profits to escape income taxes for periods up to just less than a year. For, had the partnership fiscal period ended January 1st, 1933, and had decedent died December 30th, 1933, upon petitioner's theory no part of partnership profits between those dates would have been includable in decedent's income. As income to date of death becomes principal in the hands of the legal representatives, the legal representative pays no income tax thereon. *Bull* v. *United States,* 295 U. S. 247. It seems most unlikely that Congress intended such income to escape taxation. Cf. *Irwin* v. *Gavit,* 268 U. S. 161, 166.

As pointed out by the Circuit Court of Appeals (R. 96), the question turns on whether or not the death of Mr. Fleming within his taxable year brought about the ending of what is called in the statute (Section 182 (a) of the Revenue Act of 1932, *infra,* p. 12) a "taxable year of the partnership."

The phrase should be considered in connection with Section 42 of the Revenue Act of 1932, *infra*, p. 11, which provides that items of income shall include income for the taxable year in which received, unless properly accounted for as of a different period. In the Revenue Act of 1934, the corresponding section (Sec. 42, *infra*, p. 12) was amended by adding the following:

> In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period.

It seems clear that the amendment was clarifying in purpose and declaratory of the existing law. Cf. *Helvering* v. *Twin Bell Syndicate*, 293 U. S. 312, 322. And this, alone, establishes the correctness of the lower court's decision. At any event, it discloses the relative unimportance of the question involved.

Furthermore, Section 182 (a) taxes to each partner whose taxable year is different from that of the partnership, his share of partnership income for "any taxable year", ending within his taxable year, whether distributed or not. In New York, the death of a partner causes a dissolution of the partnership. Secs. 60, 62, New York Partnership Act, *infra; Cahill* v. *Haff*, 248 N. Y. 377; *Stewart* v. *Robinson*, 115 N. Y. 328. The survivors became

trustees for the purpose of effecting liquidation and distributing decedent's share of the profits up to the date of his death. *Leonard* v. *Leonard,* 201 N. Y. S. 113; *Wolbach* v. *Commissioner,* 268 Mass. 365. As of date of decedent's death, an accounting was had, and a new partnership was formed. The partnership filed its (information) return for the period ended with his death. All that remained was to ascertain, from facts known at the date of decedent's death, the share due him. In contemplation of law, his share of the profits became distributable, and were a part of his income for the period for which his return was filed. *Darcy* v. *Commissioner,* 66 F. (2d) 581 (C. C. A. 2d), certiorari denied, 290 U. S. 705. The statute specifically provides that whether or not they were actually distributed during the period is immaterial.

It would seem settled by the decision of this Court in *Bull* v. *United States,* 295 U. S. 247, that a deceased partner's share of profits earned prior to his death is income taxable to him. This Court there held (pp. 254–255):

> We concur in the view of the Court of Claims that the amount received from the partnership as profits earned prior to Bull's death was income earned by him in his lifetime and taxable to him as such; * * *.
>
> * * * * * *
>
> * * * The decedent's share of profits accrued to the date of his death was $24,124.20. This was income to him in his life-

> time and his executor was bound to return it as such.

As the court below points out, a partnership pays no tax. Its return is purely for information. Its "taxable year" is, in reality, an accounting period. There is no reason why the accounting period cannot be for less than twelve months. Section 48 (a) of the Revenue Act of 1932, *infra*, specifically provides that "taxable year" includes fractional parts of a year for which a return is filed. It has been held in many cases that "taxable year" may include periods of less than one year. *Wolverine Petroleum Corp.* v. *Commissioner*, 75 F. (2d) 593 (C. C. A. 8th), certiorari denied, 295 U. S. 743; *Wright & Kremers* v. *United States*, 3 F. Supp. 616 (C. Cls.); *Pennsylvania Chocolate Co.* v. *Lewellyn*, 27 F. (2d) 762, 763 (W. D. Pa.); *Carroll Chain Co.* v. *Commissioner*, 1 B. T. A. 38, approved, 8 F. (2d) 529 (S. D. Ohio); *Patapsco Ballast Co.* v. *Commissioner*, 1 B. T. A. 1081; *Lynch Construction Co.* v. *Commissioner*, 3 B. T. A. 313; *Purity Oats Co.* v. *Commissioner*, 4 B. T. A. 585; *Durabilt Steel Locker Co.* v. *Commissioner*, 5 B. T. A. 239; *Bruner Woolen Co.* v. *Commissioner*, 6 B. T. A. 881.

Petitioner contends that respondent's determination includes decedent's income for a period greater than twelve months. This seems fully answered by the court below (R. 97):

> Of course this made two "partnership taxable years" end in one taxable year of the

> decedent. Yet that did not make his taxable year include his income for more than twelve months. It did, indeed, include his share of partnership income for more than a twelve-month period, but that is immaterial since the partnership is not the taxpayer. *The period for which the decedent's income is taxed is a little less than twelve months and the income on which he is taxed is only that distributable to him as of that period.* [Italics supplied.]

See also *Shonnard* v. *Price,* 49 F. (2d) 794 (E. D. N. Y.); *Jones* v. *Commissioner,* 12 B. T. A. 471.

Helvering v. *Morgan's, Inc.,* 293 U. S. 121, cited by petitioner, involved a question totally unrelated to the question here. There, a corporation joined an affiliated group and was required to file two returns in 1925. The question was whether the two separate periods in 1925 constituted two "taxable years" within the meaning of Section 206 of the Revenue Act of 1926, which permits a taxpayer suffering a net loss in any taxable year to deduct it from taxable gains in the two succeeding taxable years.

Burnet v. *Sanford & Brooks Co.,* 282 U. S. 359, also cited by petitioner, involved the attempt of a taxpayer to deduct losses in a prior year from receipts in a subsequent year from the same transaction.

Bankers' Trust Co. v. *Bowers,* 295 Fed. 89 (C. C. A. 2d), decided by the court below, involved

Section 226 of the Revenue Act of 1921, which provided that where, with the approval of the Commissioner, a taxpayer changed his basis of computing net income from fiscal year to calendar year or calendar year to fiscal year, separate returns must be filed; and that in the case of a return for less than one year, the income should be placed on an annual basis by multiplying the amount thereof by twelve and dividing the result by the number of months included in the period. The question presented was whether the section was applicable to returns filed for a decedent, and to returns covering income received by estates of decedents. The decision rested purely upon the construction of the section—the interrelation of its subsections.

CONCLUSION

The decision below is correct. It is not in conflict with decisions of other courts. It conforms to principles announced by this Court. The petition should be denied.

Respectfully submitted.

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Special Assistants to the Attorney General.

SEPTEMBER, 1937.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169, 185, 187, 222:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. * * *

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.

SEC. 48. DEFINITIONS.

When used in this title—

(a) TAXABLE YEAR.—"Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the

basis of which the net income is computed under this Part. "Taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1932, shall be the calendar year 1932 or any fiscal year ending during the calendar year 1932.

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

SEC. 182. TAX OF PARTNERS.

(a) GENERAL RULE.—There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year.

Revenue Act of 1934, c. 277, 48 Stat. 680, 694:

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable

period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period.

New York Partnership Act, Laws of 1919, c. 408:

SEC. 60. *Dissolution defined.*—The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

SEC. 61. *Partnership not terminated by dissolution.*—On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

SEC. 62. *Causes of dissolution.*—Dissolution is caused:

* * * * *

4. By the death of any partner;

* * * * *

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 901. *Partnerships.*—Partnerships as such are not subject to taxation under the Act, but are required to make returns of income. (See section 189 and articles 941 and 942.) Individuals carrying on business in partnership are, however, taxable upon their distributive shares of the net income of such partnership, whether distributed or not, and are required to include such distributive shares in their returns. The net income of the partnership shall be computed in the same manner and on the same basis as the net income of an individual, except that the deduction of contributions or gifts is not permitted, * * *.

ART. 902. *Distributive shares of partners.*—The distributive share of the net income of the partnership which a partner is required to include in his return is his proportionate share of the net income of the partnership, either—

(*a*) For the taxable year upon the basis of which the partner's net income is computed, or

(*b*) If the partner's net income is computed upon the basis of a taxable year different from that upon the basis of which the net income of the partnership is computed, for the taxable year of the partnership ending within the taxable year upon the basis of which the partner's net income is computed.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 301

GUARANTY TRUST COMPANY OF NEW YORK, EXECUTOR, ESTATE OF LAMAR L. FLEMING, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 37) is reported in 34 B. T. A. 384. The opinion of the Circuit Court of Appeals (R. 57) is reported in 89 F. (2d) 692.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 10, 1937 (R. 60). The petition for certiorari was filed on August 10, 1937, and was

granted on October 11, 1937 (R. 61). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the deceased partner's taxable income for the calendar year 1933 includes his share of partnership profits from the beginning of the partnership fiscal period on August 1, 1933, to the date of his death on December 16, 1933.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 38–42.

STATEMENT

The facts as stipulated (R. 11–37) and as found by the Board of Tax Appeals (R. 38–40) are as follows:

Lamar L. Fleming, hereinafter called the decedent or the deceased partner, died on December 16, 1933. Prior to his death his books were kept on the cash receipts and disbursements basis and his income tax returns were made on that basis for the calendar year (R. 11, 38).

Prior to his death the decedent was a member of the partnership of Anderson, Clayton & Fleming, cotton brokers, maintaining its principal office in New York. The firm was formed in 1918 and operated under successive partnership agreements, including the agreement dated August 1, 1930 (R.

18–22) which expired on July 31, 1933. The partnership kept its books and reported its income on the cash receipts and disbursements basis for the fiscal year ending July 31 of each year.

On August 1, 1933, a new partner was admitted to the firm and a new partnership agreement (R. 23–27) was made, which was identical with the previous agreement except for the division of profits and the additional partner. This agreement provided that the partnership fiscal year should begin August 1, 1933, and end July 31, 1934 (R. 24, 38). Each of these two agreements provided in Paragraph Sixth that at the end of each fiscal year for the purpose of ascertaining the profits a general account should be taken and stated of all assets and accounts due to the partnership and of all liabilities, actual or contingent (R. 20, 25). Paragraph Ninth provided that on dissolution assets should be applied first to payment of debts; second, to a return of capital; and, third, to the distribution of profits or surplus (R. 22, 27).

After the termination of the fiscal year ending July 31, 1933, the profits of the partnership for that fiscal year were computed and the partners were notified of their respective shares. A part of the decedent's share of the profits for that fiscal year was left on deposit with the partnership (R. 12, 38).

After the decedent's death the business was continued under the same name by the surviving

partners who early in May 1934, executed a new partnership agreement (R. 27–33), dated as of December 18, 1933 (December 17 being Sunday), and taking over the business as of that date. This agreement provided that the partnership should commence as of December 18, 1933, and should continue until July 31, 1934, and from year to year thereafter (R. 28, 39).

Shortly after the death of the decedent an audit of the accounts of the partnership was made for the period from August 1 to December 16, 1933. On or about January 9, 1934, the decedent's executors received in partial distribution on liquidation of the partnership the sum of $298,730.19,[1] which included the sum of $35,150.88, the decedent's share of the partnership profits received by the partnership between August 1, 1933, and December 16, 1933. This item of $35,150.88, later adjusted to $49,599.72, is the only item of income involved in this case in the Circuit Court of Appeals and in this Court. No part of the profits for this period were paid to the decedent during his lifetime or to his executors during the calendar year of 1933.

On January 30, 1934, the audit was completed and on or about February 5, 1934, the executors were paid an item of interest of $82.50 and the sum

[1] The sum of $298,730.19 also included the decedent's capital investment of $100,000 in the partnership, his credit balance with the firm in the sum of $162,795.67, and interest in the sum of $783.64 (R. 14, 39).

of $150,067.39, which included the sum of $13,-894.74, the decedent's share of uncollected commissions on "open" accounts upon purchases and sales of cotton for future delivery, earned by the partnership on or before December 16, 1933, but not paid until 1934 (R. 13–14, 39). The inclusion of his share of these commissions in the decedent's income was involved in this case before the Board of Tax Appeals, but not before the Circuit Court of Appeals, and is not now involved.

The executors of the estate filed an estate tax return for the decedent which included the decedent's credit balance with the partnership, his capital interest therein, and a share of the profits earned from August 1 to December 16, 1933, and paid an estate tax thereon (R. 16, 40).

On February 28, 1934, an income tax return was filed on behalf of "Anderson, Clayton & Fleming, in Liquidation" for the fiscal year from August 1, 1933 to December 16, 1933. No permission was obtained from the Commissioner of Internal Revenue to file such a return (R. 17, 35–36, 40). On October 28, 1934, an income tax return was filed on behalf of "Anderson, Clayton & Fleming" for the fiscal year from December 17, 1933, to July 31, 1934 (R. 17, 40).

On or about March 15, 1934, the decedent's executors filed his income tax return for the period from January 1 to December 16, 1933, the date of his death, and included his distributive share of the

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profits of the partnership for the fiscal year ending July 31, 1933, but did not include any part of his share of the partnership profits from August 1, 1933, to December 16, 1933.

By letter dated October 25, 1934, the Commissioner notified the petitioner that a deficiency in tax had been determined on the decedent's income for the period from January 1 to December 16, 1933, in the amount of $39,874.31 by adding to the decedent's income for the period from January 1 to December 16, 1933, the item of $63,494.46, which included, in addition to the decedent's share of open commissions in the sum of $13,894.74 and interest in the sum of $5,559.19 on the decendent's capital investment and credit balance with the partnership, the decedent's share of the cash earnings of the partnership during that period in the sum of $49,599.72, determined after eliminating the losses on revaluation on the partnership investments (R. 15, 34–35, 39).

The Board of Tax Appeals excluded from the decedent's income the items of interest and the decedent's share of the open commissions and also the decedent's share of the cash profits of the partnership for the period from August 1, 1933, to December 16, 1933. The petition for review of the Board's decision assigned as error only the last item (R. 52), which was the only item involved in the court below and is the only item now involved in this Court.

The Circuit Court of Appeals reversed the Board and held that the decedent's distributive share of the cash profits of the partnership for the period from August 1 to December 16, 1933, should be included in his income for that period (R. 57–60).

SUMMARY OF ARGUMENT

The deceased partner's distributive share of partnership net income received by the partnership before his death was his income and taxable to him. *Bull* v. *United States,* 295 U. S. 247.

The provision of Section 182 (a) of the Revenue Act of 1932 regulating the taxable year of a partner in which his distributive share of partnership net income is to be taxed, during his life and the continuation of the partnership, does not intend, and should not be construed, to exempt part of a partner's share of partnership income from income taxation on his death. The evident purpose of the section to tax all partnership income, the statutory meaning of the terms "taxable year" and "fiscal year," and the legislative history of Section 182 (a) disclose that the phrase "any taxable year of the partnership" means any accounting period of the partnership.

The death of the partner caused the dissolution of the partnership and the end of an accounting period or "taxable year" of the partnership with respect to the deceased partner's interest in the partnership. New York Partnership Law, Secs.

62, 74. The deceased partner is taxable on his share of the partnership profits disclosed by the accounting as of the date of his death. *Bull* v. *United States, supra; Darcy* v. *Commissioner,* 66 F. (2d) 581 (C. C. A. 2d) certiorari denied, 290 U. S. 705.

Taxation of the decedent's share of the partnership profits does not tax his income for more than a period of one year. A partner's right to a distributive share of partnership net income arises when the accounting period of the partnership ends. *Blodgett* v. *Silverman,* 277 U. S. 1, 10. At that time the partner's share of partnership net income becomes his income. All the partnership income on which the decedent was taxed here became his income in his calendar year of 1933.

ARGUMENT

I

THE DECEASED PARTNER'S DISTRIBUTIVE SHARE OF PARTNERSHIP INCOME EARNED BEFORE HIS DEATH IS SUBJECT TO INCOME TAX

The item of income in question, $49,599.72, is the deceased partner's distributive share of the partnership net income earned and actually received by the partnership between August 1, 1933, and the date of his death on December 16, 1933. In *Bull* v. *United States,* 295 U. S. 247, relied upon by the Court below (R. 59), this Court determined that a deceased partner's distributive share of partnership profits earned before his death and paid to his executors was income earned by him and

taxable to him. This Court stated at pages 254–255:

> We concur in the view of the Court of Claims that the amount received from the partnership as profits earned prior to Bull's death was income earned by him in his lifetime and taxable to him as such; and that it was also corpus of his estate and as such to be included in his gross estate for computation of estate tax. * * *
>
> * * * * * *
>
> The decedent's share of profits accrued to the date of his death was $24,124.20. This was income to him in his lifetime and his executor was bound to return it as such.

The item here involved undoubtedly was net income of the decedent. The petitioner contends, however, that the *Bull* case is not in point because there both the partnership and the deceased partner used a calendar year accounting period but here the partnership was on a fiscal year basis ending July 31 of each year, and the decedent was on a calendar year basis and, therefore, application of Section 182 (a) of the Revenue Act of 1932 results in the exemption of this income from income taxation entirely.

The respondent contends that nothing in the terms or purpose of the provisions of the applicable Revenue Act of 1932, or the applicable court decisions, excludes this income from the income of the decedent subject to an income tax under the *Bull* case.

A. *The Revenue Act Exempts No Part of Partnership Income From Taxation*

Examination of the applicable provisions of the Revenue Act of 1932 discloses no intention that the decedent's distributive share of the partnership income earned and actually received by the partnership before his death shall be exempt from income taxation.

The specific provisions of the Revenue Act of 1932 with respect to partnerships are contained in "Supplement F—Partnerships," Sections 181–189, inclusive. Treasury Regulations 77, Articles 901–941, inclusive, apply. Partnerships as such are not subject to taxation under the Act[2] but are required to make information returns of partnership income stating the amount of the distributive share of each partner. Sections 181 and 189, Articles 901, 941, 942.

Section 182 (a) of the Revenue Act of 1932 provides:

> SEC. 182. TAX OF PARTNERS.
>
> (a) General rule. There shall be included in computing the net income of each partner his distributive share, whether dis-

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[2] The Revenue Acts of March 3, 1917, Section 201, and of October 3, 1917, Section 201, for a time placed an excess profits tax on partnerships as such in addition to the income tax upon partners only in their individual capacity under the Revenue Act of 1916, Sec. 8 (e), as amended by Section 1204 (1) of the Revenue Act of October 3, 1917. All the other revenue acts impose an income tax upon partners only in their individual capacity.

> tributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year.[2]

Section 182 (b), which provides for the method of taxation if a partnership fiscal year begins in one calendar year and ends in another calendar year to which a different law is applicable, is not involved in this case.

The statute and regulations expressly provide for situations in which the partnership and a partner used different accounting periods during the continuation of the partnership. In the present case the partnerships and the deceased partner, while he was alive and during the continuation of the partnerships, used the same method of accounting, cash receipts and disbursements, but different accounting periods. He used a calendar

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[2] The federal income tax statutes uniformly provide that partners are liable for income tax on their distributive shares of the net income of a partnership, whether distributed or not. Revenue Act of 1936, Sec. 182; Revenue Act of 1934, Sec. 182; Revenue Act of 1928, Sec. 182 (a); Revenue Act of 1926, Sec. 218 (a); Revenue Act of 1924, Sec. 218 (a); Revenue Act of 1921, Sec. 218 (a); Revenue Act of 1918, Sec. 218 (a); Revenue Act of 1916, Sec. 8 (e), amended by Section 1204 (1) of the Revenue Act of October 3, 1917; Revenue Act of 1913, Sec. II, D; Revenue Act of June 30, 1864, Sec. 117, c. 173, 13 Stat. 223, 282.

year and the partnership's used fiscal years ending July 31st of each year.

The fact that the cash receipts method of accounting is used by a partner is expressly controlled by the provision of Section 182 (a) to the effect that each partner's net income shall include his distributive share, whether distributed or not, of the partnership's net income. This provision includes the distributive share of the net income received by the partnership up to the date of the deceased partner's death in his net income in the present case, even though he was on the cash receipts and disbursements basis and never received the income.

Situations in which different periods of accounting are used by a partnership and a partner, during the continuation of the partnership, are controlled expressly by the second sentence of Section 182 (a) which provides that if the accounting periods are different, the amount included in a partner's net income "shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year."

The specific provision in every revenue act which includes in a partner's net income his distributive share of partnership income, whether distributed or not, emphasizes the purpose to tax all partnership income. The specific provision with respect to the taxable year of the partner in which partnership income shall be taxed is concerned with a choice of the tax year of the partner in which the

tax may be levied. In view of the first provision, this second provision in the same section of the law cannot be construed as intending to exempt any part of partnership income from income taxation.

No express statutory provision is made for situations involving the death of a partner and the dissolution of the partnership. In the absence of such a provision the petitioner in effect contends that this second sentence of Section 182 (a), regulating the year in which the income shall be taxed during the life of a partner and the continuation of the partnership, should be construed, upon the death of a partner and dissolution of the partnership, to exempt this income from income taxation entirely by making it taxable only in a taxable year of the decedent which never arises because of his death.

The respondent contends that the fact that this income is not exempt is evident from (1) the purpose to tax all partnership income disclosed by the specific provisions taxing a partner's distributive share of partnership net income, whether distributed or not; (2) the meaning of the phrase "any taxable year of the partnership" in the statute; and (3) the legislative history of Section 182 (a).

1. The revenue acts generally by a broad definition of gross income intend to tax all income not expressly or constitutionally exempt. *United States* v. *Safety Car Heating Co.*, 297 U. S. 88, 93; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 89. Section 182 (a) discloses a similar intent

with respect to all partnership net income, whether distributed or not. Properly construed, in view of its patent purpose to regulate the choice between two taxable years during the life of the partner and the continuation of the partnership, Section 182 (a) did not intend to exempt the income involved here. In the absence of the expression of such an intent such a construction of exemption should be rejected. Cf. *Choteau* v. *Burnet*, 283 U. S. 691, 694; *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 234–235.

2. The meaning of the phrase "any taxable year of the partnership" to be derived from the statutory definition of "taxable year" supports the view that the income now involved is not exempt. Section 48 (a), appearing under that part of the Act designated "Part IV—Accounting Periods and Methods of Accounting," defines "taxable year" as the calendar year, or the fiscal year ending during such fiscal year upon the basis of which net income is computed. The same section states that the term "taxable year" includes a period less than a year in the case of a return made for a fractional part of a year according to law or regulations. Section 48 (b) defines the term "fiscal year" as an *accounting period* of twelve months ending on the last day of any month other than December. Section 1111 (b) states that the term "includes" when used in a definition in the Act does not exclude other things within the meaning of the term defined. The courts hold generally that "taxable year" may include a period of less than a year.

Wolverine Petroleum Corp. v. *Commissioner*, 75 F. (2d) 593, certiorari denied, 295 U. S. 743; *Wright & Kremers* v. *United States*, 3 F. Supp. 616 (ct. cl.).

These definitions disclose that the phrase "taxable year" as used in these sections and in Section 182 (a) with respect to partnerships means merely an accounting period which may be a year or less. The phrase "any taxable year of the partnership" may be read and interpreted as "any accounting period of the partnership." Only in this sense of an accounting period has a partnership any "taxable year." In any other sense of the term "taxable year" a partnership has no taxable year because it is not a taxpayer.

The court below, basing its decision on this interpretation of the statute, correctly concluded (R. 59):

> Strictly speaking, a partnership has no taxable year since it is not a taxpayer. It is required to file information returns for so-called taxable years which are either fiscal or calendar and are in fact accounting periods covering twelve months. This does not mean that there can be no accounting period of a partnership for income tax purposes for less than twelve months. The present case serves well as an example of what will shorten such an accounting period or taxable year of a partnership, viz, the dissolution of the partnership caused by the death of a partner after the beginning of the current year and before its end.

3. The legislative history of the second sentence of Section 182 (a)[4] supports the construction that "any taxable year of the partnership" means any accounting period of the partnership. This provision first appeared in Section 218 (a) of the Revenue Act of 1918, set forth in the appendix, which provided that if the partner's and partnership's net income was computed on the basis of different periods there should be included in his net income "his distributive share of the net income of the partnership for any accounting period of the partnership ending within" the partner's fiscal or calendar year.[5]

Section 218 (a) of the Revenue Act of 1924 changed the phrase "any fiscal or calendar year" of the partner to the present phrase, "any taxable year" of the partner without any change of meaning. Similarly, the phrase "any accounting period of the partnership" was changed by the Revenue Act of 1928[6] to the present phrase, "any taxable

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[4] Section 182 of the Revenue Act of 1928 and the same section of all later revenue acts contain the same sentence.

[5] The House bill contained the phrase "the last annual accounting period of the partnership prior to the close" of the partner's fiscal or calendar year and was changed by a Senate amendment to the phrase "any accounting period of the partnership ending within" the partner's fiscal or calendar year. Cf. H. R. 12363, 65th Congress, 3rd Sess. (Committee Print—As Agreed to in Conference).

[6] The Report of the Joint Committee on Internal Revenue Taxation, Volume II, Proposed Rearrangement of Income Tax Title (1927), proposed a draft of the Revenue Act of 1928 in the rearranged form in which that Act and

year of the partnership," without any change of meaning. These changes were made merely to obtain and to complete the uniform terminology which now appears in the rearranged form of the revenue acts since the Revenue Act of 1928.

Section 200 (a) of the Revenue Act of 1918 contained the definition of "taxable year" as a calendar or fiscal year and the definition of "fiscal year" as an accounting period. Section 200 (a) of the Revenue Act of 1924 added the statement that "taxable year" includes a period of less than a year. This fact that "taxable year" was defined as a calendar or fiscal year and that "fiscal year" was defined as an accounting period under all these revenue acts supports the view that the change of terms, defined in the same manner in these revenue laws, did not change the meaning.

Furthermore, the fact that these changes were made without comment, so far as an examination of their legislative history has revealed, supports the view that no change of meaning occurred.

The petitioner argues in Point II of its brief (pp. 14–16) that, as a matter of statutory construction of Section 182 (a), Congress, by use of the phrase "*any* taxable year of the partnership," meant "*only one* taxable year of the partnership."

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all later revenue acts have appeared. Section 182 (a) of that draft used the phrase "any accounting period of the partnership" which had been used in former acts, and the House bill (H. R. 1, 70th Congress, 1st Sess.) changed it to the present form of "any taxable year of the partnership."

The respondent submits that neither the common meaning of the word "any" nor its meaning in this context permits such a restricted construction in order to exempt income from income taxation. The original change of the provision in Section 218 (a) of the House bill which became the 1918 Revenue Act from "the last annual accounting period of the partnership" to "any accounting period of the partnership" makes this clear.

The petitioner seeks to aid its construction by reference to the fact that Treasury Regulations 77, Art. 902 (b), instead of repeating verbatim the statutory phrase "any taxable year" paraphrases it as "the taxable year." This phrase in Article 902 (b) indicates no intention to go beyond mere repetition of the statute and means any taxable year, or all of the taxable years of the partnership, within the meaning of the language of the statute.

The respondent submits that the purpose, meaning, and history of Section 182 (a) make it clear that the statutory phrase "any taxable year of the partnership" means any accounting period of the partnership. The court below correctly reached this result and then correctly applied the uniformly accepted statutory and common law rule of partnership law, discussed below, to the effect that the death of a partner dissolves a partnership and ends an accounting period with respect to the deceased partner.

B. *Death of a Partner Dissolves the Partnership and Ends an Accounting Period with Respect to the Deceased Partner*

The partnership here involved, maintaining its principal office in New York (R. 11), was a New York partnership governed by the New York Partnership Law (New York Laws 1919, ch. 408, as amended, Consolidated Laws, ch. 39, succeeding Consolidated Laws of 1909, ch. 44) which adopted the Uniform Partnership Act. "Dissolution and Winding Up" of partnerships is regulated by Article 6, Sections 60 to 75.

The death of a partner causes dissolution of a partnership under the New York Partnership Law (Sec. 62, subdivision 4; *Cahill* v. *Haff*, 248 N. Y. 377, 380; *Darcy* v. *Commissioner*, 66 F. (2d) 581, 584 (C. C. A. 2d), certiorari denied, 290 U. S. 705) and at common law. *Burwell* v. *Mandeville's Executor*, 2 How. 559, 576; *Stewart* v. *Robinson*, 115 N. Y. 328, 333. The partnership agreement in the instant case contained no specific provision for winding up or carrying on the business on the death of a partner. The partnership was dissolved by operation of law.

The dissolution of a partnership by the death of a partner terminates all authority of any partner to act for the partnership, except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not finished, or to

bind the partnership or other partners except in limited circumstances provided by statute. Secs. 64–66; cf. Secs. 60, 61, 72.

A most important legal effect of dissolution of the partnership is that the right to an account of the deceased partner's interest accrued to his executors at the date of dissolution in the absence of a contrary agreement. Sec. 74.

The partnership agreement in this case provided only that at the end of each fiscal year, for the purpose of ascertaining profits, a general account should be taken and stated (R. 25) and that on dissolution for any cause the assets should be applied, in turn, to pay debts, to return invested capital, and to distribute profits (R. 27). The agreement did not modify the right of the petitioner to an accounting which accrued upon the death of the partner.

The right of the deceased partner before his death to possess specific partnership property for partnership purposes vested in the surviving partners and not in his personal representative. Sec. 51; *Blodgett* v. *Silberman,* 277 U. S. 1, 10. The legal representative received the right to an accounting under Section 74. *Cahill* v. *Haff, supra; Stem* v. *Warren,* 227 N. Y. 538, 546.

The surviving partners recognized that the partner's death ended a partnership accounting period with respect to his share and made an ac-

counting of his share as of the date of his death (R. 39).

These applicable provisions of the partnership law make it clear that the most important effect of dissolution of a partnership, so far as the interest of the deceased partner is concerned, is the ending of an accounting period of the partnership. The respondent submits that the ending of such an accounting period in the present case upon the death of the partner was the ending of an accounting period or "taxable year" of the partnership within the meaning of Section 182 (a) of the Revenue Act of 1932.

C. *The Deceased Partner's Share of Income Received by the Partnership Before His Death Was Taxable to Him*

In addition to the interpretation of Section 182 (a) of the Revenue Act of 1932 and the ending of a partnership accounting period by the death of a partner by operation of partnership law, in the absence of an agreement to the contrary, discussed above, the respondent's position is supported by the cases taxing a deceased partner's share of partnership income earned up to the time of his death.

If a partner dies during a partnership annual accounting period ending within his taxable year he is required to pay an income tax on his share of partnership profits earned before his death. *Bull*

v. *United States,* 295 U. S. 247; *Davison* v. *Commissioner,* 20 B. T. A. 856, affirmed without opinion, 54 F. (2d) 1077 (C. C. A. 2d); *Smith* v. *Commissioner,* 26 B. T. A. 778, petition to review dismissed because not filed in time, with a statement that the decision below was correct, 67 F. (2d) 167, 170 (C. C. A. 4th); *People's-Pittsburgh Trust Co.* v. *United States,* 10 F. Supp. 139 (Ct. Cls.); *First Trust Co. of Omaha* v. *United States,* 1 F. Supp. 900 (Ct. Cls.); *Hall* v. *Commissioner,* 25 B. T. A. 1; *Goldman* v. *Commissioner,* 15 B. T. A. 1341.

In *Bull* v. *United States, supra,* this Court held at page 254 that profits earned by the partnership before the death of the partner "was income earned by him in his lifetime and taxable to him as such; * * *."

If the deceased partner's share of partnership profits is determined not at his death but, pursuant to the partnership agreement, at the end of an annual accounting period after his death, the Commissioner's determination of his share at his death by proration, will be upheld in the absence of evidence that the proration does not disclose his actual distributive share at the date of his death. *Darcy* v. *Commissioner,* 66 F. (2d) 581 (C. C. A. 2d), certiorari denied, 290 U. S. 705. Compare *United States* v. *Wood,* 79 F. (2d) 286 (C. C. A. 3d), certiorari denied, 296 U. S. 643.

In the *Goldman* case the Board approved taxing a deceased partner, on the calendar year and cash

basis, who died on November 10, 1924, on his distributive share of net income earned by the partnership, on the same basis, up to that time.

These cases show that it was not intended by the statute to exempt from the income tax any part of the deceased partner's distributive share of partnership income earned before his death. The petitioner, however, relies on *R. W. Archbald, Jr., et al* v. *Commissioner,* 4 B. T. A. 483 and *DeRoy* v. *Commissioner,* 19 B. T. A. 452, as expressing a rule in its favor on facts similar to the facts here.

In the *Archbald* case, the Board, two members dissenting without opinion, held that only the deceased partner's share of partnership income earned in its fiscal year ending January 31, 1920, could be included in his calendar year return for 1920, when he died on August 15, 1920. In the *DeRoy* case the Board followed the *Archbald* decision without extended discussion.[1]

In the *Archbald* case the Board cited no authority for its conclusion. It admitted at page 484 that the partner's "death in 1920 ended his accounting or taxable period" and dissolved the partnership. It refused to hold, however, that the death of the partnership, its dissolution, ended its

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[1] Under these decisions if a partnership were formed on January 31, 1933 (or any time during 1933, after January 1, 1933), and used a fiscal year ending in 1934, the share of partnership income of a partner using the calendar year basis and dying during 1933 would not be subject to income tax to him or to his estate.

accounting or taxable period. It made no reference to the statutory provision of the Uniform Partnership Act, applicable to this Pennsylvania partnership, to the effect that death of a partner gives his representative a right to an accounting as of the date of death and dissolution of the partnership (Pennsylvania Uniform Partnership Act of March 26, 1915, Penna. Laws, 18, 25–26, part VI, Sec. 43, Purdon's Penna. Statutes Annotated, Permanent Ed., Title 59, Sec. 105) and thereby ends an accounting period of the partnership."

In *Goldman* v. *Commissioner,* 15 B. T. A. 1341, the majority opinion states at page 1352:

> To the extent, however, that the views expressed in the *Archbald* case are in conflict with the views herein expressed, the *Archbald* case is overruled.

The dissenting opinion stated at page 1354:

> It is also pertinent to point out that the prevailing opinion overrules *R. W. Archbald, Jr., et al.,* 4 B. T. A. 483.

In *Hall* v. *Commissioner,* 25 B. T. A. 1, the Board stated at pages 3–4:

> In the *Goldman* case we specifically overruled the *Archbald* case in so far as the two were in conflict. This leaves the *Goldman* case as representing our present view.

It is apparent that the Board does not consider its reasoning consistent in the *Archbald, Goldman,* and *DeRoy* cases. The Board states that death ends the partner's accounting period or taxable

year. *R. W. Archbald, Jr. et al.*, 4 B. T. A. 483, 484. The same rule is stated elsewhere with respect to taxation of deceased partners. *People's-Pittsburgh Trust Co.* v. *United States*, 10 F. Supp. 139, 142. The Board errs in holding that dissolution of the partnership does not also end its accounting period with respect to the deceased partner.

The surviving partners recognized that the partner's death ended an accounting period or "taxable year" of the partnership not only by making an accounting as of the date of his death; but also by filing an income tax return on February 28, 1934, without obtaining permission of the Commissioner of Internal Revenue, for the partnership in liquidation which was designated "Partnership Return of Income. For Fiscal Year 1933. Fiscal Year Begun August 1, 1933, and ended 12/16/33" (R. 17). This indicates that the respondent's interpretation of Section 182 (a) conformed to the business practice of the partnership which treated the death of a partner as closing an accounting period or taxable fiscal year of the partnership.

It is submitted that the Congress intended to tax all of a deceased partner's share of partnership income earned before his death. A rule of partnership law, in the absence of a contrary agreement, gives to a deceased partner's representative the right to an account at the date of dissolution of the partnership and thereby ends an accounting

period of the partnership in respect of the deceased partner's share of partnership profits. The cases cited herein holding that a deceased partner is taxable on his distributive share of partnership net income earned at his death before the end of the partnership's annual accounting period indicate that his death ends a partnership accounting period or "taxable year" with respect to the decedent's share. In view of these considerations the court below correctly held that an accounting period or "taxable year" of the partnership within Section 182 (a) of the Revenue Act of 1932 ended at the death of the partner and the dissolution of the partnership.

II

THE DECISION BELOW DID NOT INCLUDE DECEDENT'S INCOME FOR A PERIOD OF MORE THAN TWELVE MONTHS

The petitioner states in Point I of its brief (p. 12) that the clear effect of the decision below is the inclusion of income of 16½ months of the decedent.

The court below correctly answered the petitioner's contention that 16½ months of the decedent's income was included when it stated (R. 59):

> Of course this made two "partnership taxable years" end in one taxable year of the decedent. Yet that did not make his taxable year include his income for more than twelve months. It did, indeed, include his share of partnership income for more than a twelve-month period, but that is immaterial since the partnership is not the taxpayer. * * *

Sections 182 and 183 of the Revenue Act of 1932 provide for the computation of partnership net income separately from a computation of a partner's net income and thus recognizes the separate entity of a partnership for this purpose. For other purposes, other statutes also recognize "the separate entity of the partnership." *United States* v. *Kaufman*, 267 U. S. 408, 411. The partners do not own partnership assets as such. The interest of a partner is the right to receive a share of the net value of assets over liabilities after a settlement or account. *Blodgett* v. *Silberman*, 277 U. S. 1, 12. His interest is his share of the profits and surplus. New York Partnership Law, Sec. 52.

This recognition of the partnership entity for tax purposes has been applied also in the cases holding that a partner may not offset personal losses from sales of securtities held for two years or less against his distributive share of partnership profits from similar sales even though he may offset such losses against gains from his own similar sales. *Johnson* v. *Commissioner*, 86 F. (2d) 732 (C. C. A. 2d), certiorari denied, 301 U. S. 683; *Sartorious* v. *Commissioner*, decided April 26, 1937, by the Board of Tax Appeals but unreported, petition for review pending undetermined in the Circuit Court of Appeals for the Second Circuit when a petition for certiorari was filed, and denied, 301 U. S. 688; *Haffner* v. *Commissioner*, 90 F. (2d) 1009 (C. C. A. 2d), certiorari denied October 11, 1937; *Klingenstein* v. *United States*, 18

F. Supp. 1015 (C. Cls.), certiorari denied October 11, 1937; cf. *Davis* v. *United States*, 87 F. (2d) 323 (C. C. A. 2d), certiorari denied, 301 U. S. 704.

The statutory scheme of including in a partner's net income the partnership income earned before the beginning of a partner's accounting period, if the partnership accounting period ends in his accounting period, indicates that the period in which partnership income is earned by the partnership does not determine the time at which the decedent earned or obtained a right to his taxable distributive share of partnership net income. The decedent's distributive share arose and became taxable to him at the end of each accounting period of the partnership with respect to him. At that time his right to an accounting and determination of his distributive share arose. As of that time partnership net income was computed, his distributive share was determined, and his income arose.

This view that the income of the decedent for more than one year has not been included because the decedent's distributive share of partnership net income did not arise as the partnership earned income but only when partnership net income was determined at the end of the two accounting periods of the partnership ending within the decedent's taxable year is supported by several other considerations.

1. The decedent's share of partnership net income would not be determined before the end of a partnership accounting period. Income in the

first part of the accounting period before the decedent's taxable year, might be offset by losses in the latter part of the accounting period. *Earle* v. *Commissioner*, 38 F. (2d) 965 (C. C. A. 1st). The decedent's share of partnership net income did not arise until the end of an accounting period fixed the date for determination of his share. The ending of two accounting periods in his calendar year of 1933 determined his income from the partnership in that year.

2. Even if partnership income is distributed monthly to a partner, it is not income in the taxable year received if the partnership accounting period ends in the partner's next taxable year. It becomes his taxable income in his taxable year in which the partnership accounting occurs. *Shonnard* v. *Price*, 49 F. (2d) 794 (E. D. N. Y.); *J. H. Goodby Mills* v. *Commissioner*, 3 B. T. A. 1245. The statutory test is not how many months' partnership income may be taxed but whether a partnership accounting period, or more than one such period, ends in the partner's taxable year and thus determines his share of partnership net income taxable to him in that year. Cf. *Jones* v. *Commissioner*, 12 B. T. A 471.

3. Furthermore, the two partnership accounting periods or "taxable years" involved are accounting periods of two different partnerships of which the decedent was a member. The accounting period ending July 31, 1933, was the accounting period of

the partnership formed by the partnership agreement dated August 1, 1930 (R. 18–22) which provided in Article Third (R. 19) that the partnership should continue until July 31, 1931, and thereafter should be deemed to have been continued from year to year unless any one of the partners should give notice of intention to terminate the partnership on July 31st of any year, provided that the partners could dissolve the partnership by mutual consent at any time.

The second accounting period ending on December 16, 1933, was the accounting period of the partnership formed on August 1, 1933, and dissolved on December 16, 1933, by the partner's death. This partnership agreement (R. 23–27) admitted a new partner and provided for a different division of partnership profits.

Dissolution of a partnership is caused by the termination of the definite term provided in the agreement. New York Partnership Law, Sec. 62, subdivision 1 (a). When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of a deceased partner assigns) his rights in partnership property to two or more partners, or to one or more partners and one or more third persons, if the business is continued without liquidation of partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business. Sec. 72.

The new partnership agreement, admitting a new partner and continuing the business, produced the dissolution of the first partnership and the formation of the second partnership on August 1, 1933. Inclusion of decedent's share of partnership net income for one year from one partnership and for four months from another partnership does not include his income for more than a year but only includes income accrued to him from two partnerships in one year.

4. The revenue acts now recognize that even non-partnership income must be treated differently in the taxable year of a taxpayer's death than if he had lived through all of that year. Section 42 of the Revenue Act of 1932 provides that amounts accrued up to the date of death of a taxpayer shall be included in computing net income if not otherwise includible. As a result of this section a taxpayer on a cash basis is taxed during the year of his death on income on which he would not be taxed until the following year if he had lived. It is his income, however, during the year in which he died.

Before the enactment of the Revenue Act of 1932 the same result was accomplished with respect to partnership income by the method in which it was taxed. Sec. 182 (a) taxed a partner on his distributive share of partnership income whether distributed or not, even though he was on a cash basis for other income. When death dissolved the

partnership and ended its accounting period, the decedent's distributive share was determined as of that date and taxable to him in that year even though, if he had lived, it would not have been determined or taxable until the next year because the accounting period of the partnership would not end until the next year.

The petitioner states (brief p. 12) that by including the decedent's share of the partnership profits for the period ending with his death, as well as for the period ending July 31, 1933, his surtax rate is raised from 29% (applicable as the return was filed) to 50% under the Commissioner's determination. It is not understood how the petitioner computed these surtax rates of 29% and 50%. It is true that under Section 12 of the Revenue Act of 1932 the surtax rate is 50% on the excess income over $200,000, the sum of $31,919.45 in this case, as the income is determined on the decision of the court below. But on the excess income over $150,000, the sum of $32,319.73, as reported in the decedent's return, the surtax rate is 49% and not 29% and, therefore, apparently the petitioner does not refer to the surtax rates or surtax brackets in this sense.

The return as filed reported a net income of $182,319.73. The surtax on $150,000 was $46,460.00 and on the remaining sum of $32,319.73 the surtax at 49% was $19,836.67, a total surtax of $62,296.67. This surtax is 34% of the net income of $182,319.73.

The decedent's share of partnership profits from July 31, 1933, to December 16, 1937, added to his income under the decision of the court below was $49,599.72, the item of income here involved. This sum added to the income reported makes an income of $231,919.45. The surtax on $200,000 is $70,960.00, and on the remaining sum of $31,919.45 at 50% is the sum of $15,959.72, a total surtax of $86,919.72. This surtax is 37% of the net income of $231,919.45. It would appear that inclusion of the item now involved changes the surtax rate in this sense from 34% to 37% and not from 29% to 50%.

If the additional item of income of $49,599.72 were taxed under the lower bracket at the rate of 49%, in the amount of $24,303.86, and this sum were added to the surtax of $62,296.67 reported for the decedent, a total surtax of $86,600.53 would be obtained under the lower bracket. This sum is only $319.19 less than the total surtax of $86,919.72 under the higher bracket. The argument based on the change of rate of surtax does not support a claimed exemption of this item entirely from income tax. Such an exemption would cause a difference of income tax liability of $28,620.04, the difference between the tax liability reported in the amount of $76,380.06 and the amount of $105,000.10 computed on the basis of the decision of the court below.

Helvering v. *Morgan's, Inc.*, 293 U. S. 121, cited by petitioner, involved a question totally unrelated

to the question here. There, a corporation joined an affiliated group and was required to file two returns in 1925. The question was whether the two separate periods in 1925 constituted two "taxable years" within the meaning of Section 206 of the Revenue Act of 1926, which permits a taxpayer suffering a net loss in any taxable year to deduct it from taxable gains in the two succeeding taxable years.

Burnet v. *Sanford & Brooks Co.*, 282 U. S. 359, also cited by petitioner, involved the attempt of a taxpayer to deduct losses in a prior year from receipts in a subsequent year from the same transaction.

Bankers' Trust Co. v. *Bowers*, 295 Fed. 89 (C. C. A. 2d), decided by the court below and cited by the petitioner, involved Section 226 of the Revenue Act of 1921, which provided that where, with the approval of the Commissioner, a taxpayer changed his basis of computing net income from fiscal year to calendar year or calendar year to fiscal year, separate returns must be filed placing the income on an annual basis by a special statutory computation. The statement in the opinion, for purposes of construing Section 226, that the decedent's tax period did not end with his death has no application to this case of a deceased partner's taxable year which does end with his death. *People's-Pittsburgh Trust Co.* v. *United States*, 10 F. Supp. 139, 142.

III

CONGRESS HAS NOT ADOPTED PETITIONER'S INTERPRETATION

The petitioner argues in Point IV of its brief (p. 24) that reënactment of Section 182 (a) after the decisions of the Board of Tax Appeals, acquiesced in by the Commissioner, constitutes implied legislative approval of those decisions. That rule in aid of construction of a statute may operate in the case of an authoritative decision of this Court, or a substantial number of decisions of lower courts, acquiesced in by the Commissioner, and of a character important enough for indulgence of the presumption that Congress was aware of them. But the operation of that rule here is not warranted by the decisions of the Board on which the petitioner relies (*Archbald* and *DeRoy* cases) and which disclose, when read with other Board decisions (*Goldman* and *Hall* cases) that even the members of the Board are not in agreement on the reasoning on meaning of their decisions. An examination of all of the decisions of the Board cited herein does not disclose a clear, well known, and accepted rule which it may be presumed was known to Congress, approved by Congress, or embodied in the reënacted provision of the statute.

The petitioner also argues (brief pp. 7–10) that some income was exempted on the death of a taxpayer on the cash receipts and disbursements basis before Section 42 of the Revenue Act of 1934 provided that in the case of the death of a taxpayer

income accrued up to the date of death should be included, *if not otherwise properly includible.* The petitioner argues that this section changed the law and that, therefore, the decedent's partnership income before the change was exempt. It will be noted, however, that even before the change, income not actually received by a taxpayer on a cash basis might be taxed as constructively received in some situations. *Maryland Casualty Co.* v. *United States,* 251 U. S. 342; *Loose* v. *United States,* 74 F. (2d) 147 (C. C. A. 8th).

Furthermore, the quotation from the sub-committee report on page 9 of the petitioner's brief makes it clear that the amendment was concerned with income generally of a taxpayer on a cash basis and was not in any manner concerned with computation of a partner's share of partnership net income which is computed under Section 182 (a), which was not changed in the Revenue Act of 1934. It becomes apparent that the amendment did not affect partnership income when it is noted that Section 182 (a) includes in a partner's net income his distributive share of partnership net income, whether distributed or not, and whether he is on a cash or accrual basis. Even if the amendment be held now to apply to a partner's share of partnership net income it accomplishes only what Section 182 (a) accomplishes without the amendment and, therefore, is merely an additional statement of existing law with respect to partnership

income. *Helvering* v. *Twin Bell Syndicate* 293 U. S. 312, 322.

CONCLUSION

Congress intended to tax all income not specifically exempted. Section 182 (a) should not be construed to defeat that intention. The decision of the court below should be affirmed.

Respectfully submitted.

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JANUARY 1938.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169, 185, 187, 222:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. * * *

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.

SEC. 48. DEFINITIONS.

When used in this title—

(a) *Taxable year.*—"Taxable year" means the calendar year, or the fiscal year

ending during such calendar year, upon the basis of which the net income is computed under this Part. "Taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1932, shall be the calendar year 1932 or any fiscal year ending during the calendar year 1932.

(b) *Fiscal year.*—"Fiscal year" means an accounting period of twelve months ending on the last day of any month other than December.

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

SEC. 182. TAX OF PARTNERS.

(a) *General rule.*—There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year.

Revenue Act of 1934, c. 277, 48 Stat. 680, 694:

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as

of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period (U. S. C., Title 26, Sec. 42).

Revenue Act of 1918, c. 18, 40 Stat. 1057:

SEC. 218. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed.

New York Partnership Act, Laws of 1919, c. 408:

SEC. 60. *Dissolution defined.*—The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

SEC. 61. *Partnership not terminated by dissolution.*—On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

SEC. 62. *Causes of dissolution.*—Dissolution is caused:

* * * * *

4. By the death of any partner;

* * * * *

SEC. 72. *Liability of persons continuing the business in certain cases.* 1. When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

* * * * *

SEC. 74. *Accrual of actions.* The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of agreement to the contrary.

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 901. *Partnerships.*—Partnerships as such are not subject to taxation under the Act, but are required to make returns of income. (See section 189 and articles 941 and 942.) Individuals carrying on business in partnership are, however, taxable upon their distributive shares of the net income of such partnership, whether dis-

tributed or not, and are required to include such distributive shares in their returns. The net income of the partnership shall be computed in the same manner and on the same basis as the net income of an individual, except that the deduction of contributions or gifts is not permitted, * * *.

ART. 902. *Distributive shares of partners.*—The distributive share of the net income of the partnership which a partner is required to include in his return is his proportionate share of the net income of the partnership, either—

(*a*) For the taxable year upon the basis of which the partner's net income is computed, or

(*b*) If the partner's net income is computed upon the basis of a taxable year different from that upon the basis of which the net income of the partnership is computed, for the taxable year of the partnership ending within the taxable year upon the basis of which the partner's net income is computed.

U.S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

No. 301.—October Term, 1937.

Guaranty Trust Company of New York, Executor, Estate of Lamar L. Fleming, Deceased, Petitioner, *vs.* Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 28, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

Whether a deceased partner's taxable income for the calendar year 1933 includes his share of partnership profits from the beginning of the partnership fiscal year on August 1, 1933, to the date of his death in the same year, in addition to his share of the partnership profits for its fiscal year ending July 31, is the question for decision.

Petitioner's testator, who died December 16, 1933, was a member of a New York partnership whose fiscal year expired on July 31, 1933. The partnership, with the addition of a new partner, was renewed, by agreement, for one year from August 1. After his death the surviving partners, by a further agreement, continued the partnership business from that date until July 31 of the next year, as of which date profits were to be determined, and thereafter from year to year. Decedent kept his books on the cash receipts and disbursements basis and filed his returns for income tax for each calendar year on that basis. The partnership kept its books on a like basis, but made its returns for a fiscal year ending July 31.

Upon a partnership accounting as of the date of decedent's death, his share of the profits from August 1 to that date was ascertained and in the following January and February was paid to petitioner, as executor. In making return for taxation of decedent's income for 1933, petitioner included decedent's share of the firm profits accruing for the year ending July 31, but omitted to return his share of the firm profits earned between that time and his death.

The Commissioner's determination of a deficiency based on the omitted income, was set aside by the Board of Tax Appeals. 34 B. T. A. 384. The Board's order was reversed by the Court of Ap-

peals for the Second Circuit, which held that decedent's share of the partnership profits for the year ending July 31 and for the ensuing period ending December 16, 1933, was income of decedent in 1933 and taxable as such for that year. 89 F. (2d) 692. We granted certiorari, — U. S. —, the question being of importance in the administration of the revenue laws and the decision being challenged by petitioner as not in harmony with *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359.

Both by the practical construction given to the partnership agreement by petitioner and the surviving partners, and by the applicable provisions of the New York Partnership Act,[1] decedent's death dissolved the partnership, terminated his right to share in the profits, and fixed the date as of which the surviving partners were bound to account for the profits. *Darcy* v. *Commissioner*, 66 F. (2d) 581. Decedent's estate in fact received the profits accrued on the date of his death, and partnership profits thus accrued and distributable by reason of the death of a partner are his income, taxable as such. *Bull* v. *United States*, 295 U. S. 247. But petitioner insists that here they cannot be included in decedent's 1933 income for purposes of taxation, since in that case his partnership profits both for the full year ending July 31, 1933 and for the ensuing four and one-half months' period ending with his death in December, would be taxed as his profits for a single year. This it is said offends against the policy of the revenue acts to assess income taxes annually on the basis of twelve month periods and, so offending, conflicts with the appropriate construction of the applicable provisions of §§ 181, 182 of the Revenue Act of 1932, 47 Stat. 169, relating to the taxation of partnership profits.

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[1] New York Partnership Act, Laws of 1919, c. 408:

"Sec. 60. *Dissolution defined.*—The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

"Sec. 61. *Partnership not terminated by dissolution.*—On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

"Sec. 62. *Causes of dissolution.*—Dissolution is caused:

. . . . . .

"4. By the death of any partner;

. . . . . .

"Sec. 74. *Accrual of actions.*—The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of agreement to the contrary."

Under the Act of 1932, as with earlier revenue acts, partnerships are not taxed upon their income. By § 189 they are required to file information returns showing the partnership profits and the respective shares of the partners in the profits. But § 181 provides that the partners shall be "liable for income tax only in their individual capacity", and § 182(a) reads:

"*General rule.*—There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year."

Since the partnership is not a taxpayer, it has no taxable year in a literal sense. But as used in this section "taxable year of the partnership" means its fiscal year, for "taxable year" is defined by § 48 as including in its meaning "a fiscal year . . . upon the basis of which the net income is computed" and "fiscal year" is defined as "an accounting period of twelve months ending on the last day of any month other than December." A "taxable year", it is declared, includes the period for which a return is made when, under the provisions of the act or regulations, a return for a fractional part of a year is required. As a partner's profits are ascertainable only on an accounting for such periods as may be fixed by law or by the partnership itself, and as the fiscal year or accounting period of the partnership may differ from that of the taxable year of the partner, §182(a), as a matter of convenience to taxpayers, authorizes and provides for this difference by requiring in that case that the partner's distributive share of the profits ascertained at the end of the partnership fiscal year shall be included in his taxable income for the year in which the fiscal year of the partnership ends.

Petitioner does not complain of the taxation of decedent's share of the partnership profits for the year ending July 31 as 1933 income. But it contends that the reference in § 182(a) to the "taxable year of the partnership", and the requirement that the amount of the partner's taxable income "shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year", read in their context and in the light of the practice long established by the revenue acts, of taxing income for twelve month periods, contemplate that a partner returning

income for a calendar year shall be taxable in that year only upon his income from his firm for a single partnership year. This is said to be the case even though the income derived by a partner from the firm business between the end of the partnership fiscal year and the date of his death in the same year cannot be taxed in any other.

This argument is, we think, based upon a misconception of the policy of the Act and a mistaken construction of § 182(a). It is true that the acts of Congress taxing income have consistently laid the tax upon the net income received by or accrued to the taxpayer in a "taxable year", which is either the calendar year or a different fiscal year, as the taxpayer may elect. But they have never undertaken to limit the income taxable in any one year to that derived from the taxpayer's activities occurring in that or any other single year. The items of gross income and of allowed deductions to be included in the income return, are those of the taxpayer for his taxable year, even though they may have resulted from or be affected by his business transactions of other years. *Burnet* v. *Sanford & Brooks Co., supra,* 364, 365. Circumstances wholly fortuitous may determine the year in which income, whenever earned, is taxable, and may thus affect the amount of tax. Receipt of income or accrual of the right to receive it within the tax year is the test of taxability, not the time it has taken the taxpayer to earn it nor the duration of his investments which have finally resuled in profit. *Lucas* v. *Alexander,* 279 U. S. 573.

The revenue acts have consistently adhered to that policy in taxing the income of a partner. Since the partner is entitled to profits only upon a partnership accounting at the end of an accounting period, his profits become subject to income tax when and as they are thus ascertained. As in the case of all other taxpayers, the partner's net income is required by the general provisions of § 41 to be computed "on the basis of the taxpayer's annual accounting period", here the calendar year, so as clearly to reflect the income. And §182(a) commands that the distributive share of each partner in the partnership profits shall be included in computing his tax, whether distributed or not.

By these provisions the taxable income of a partner is limited to that share of the partnership earnings to which he becomes entitled within his taxable year, but it includes all the distributive share of the partnership income which accrues to him in that year even though earned in an accounting period not wholly

within the year, and though his return, as in the case of decedent, is on the cash receipts and disbursements basis. If the provisions stood alone it would seem plain that the profits accruing to decedent from the two partnership accountings within his taxable year would be taxable in that year, even though the accounting periods aggregated more than twelve months. We think the concluding sentence of § 182(a), which provides for the case where the partner's taxable year differs from that of the partnership, does not call for any different result.

We need not inquire too meticulously whether the partnership "taxable year", within the meaning of §182(a), includes in the special circumstances of this case an accounting period of less than twelve months, here from July 31 to the death of decedent. Petitioner makes no contention that it does not, nor could well do so, for if not so included it is not within the phrase "any taxable year of the partnership", occurring in the second sentence of § 182(a), on which petitioner relies to exclude the income for that period from taxation otherwise imposed by the general provisions of § 41 and the first sentence of § 182(a). The argument is that the year ending July 31, 1933, was one partnership fiscal year or accounting period, and that the ensuing period until the death of decedent was another, and that the inclusion of the income for both periods in decedent's taxable income is precluded by the use of the phrase "any taxable year" in § 182(a), which it is said must be taken to mean any one accounting period of the partnership.

But we think the sentence must be read as supplementing the preceding one and § 41, and not as limiting them. We can discern elsewhere in the Act no indication of any Cong essional purpose to relieve business income from taxation in the year when, under the applicable provisions of the statute, it is distributable to a partner. Sections 11 and 12 declare in all inclusive terms that income taxes "shall be levied, collected, and paid for each taxable year upon the income of every individual." It would require more precise words than those of § 182(a) directing that the taxable income of a partner shall be based on partnership income for "any" accounting period of the partnership ending within its taxable year, to restrict the broad sweep of §§ 11, 12 and 41. Cf. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 234, 235; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 89; *United States* v.

Safety Car Heating & Lighting Co., 297 U. S. 88, 93; *Helvering* v. *Gowran*, 302 U. S. 238, 243, 244.

The purpose of § 182(a) when read, as it must be, with these other sections, is obviously not to relieve a partner from taxation of any part of the distributive share of the partnership income during the year in which it is distributable. The object is rather to make certain that "the amount so included" in a partner's taxable income "shall be based upon the income of the partnership" distributable during the partner's taxable year, even though an accounting period of the partnership ending in that year may not be wholly within it.

This conclusion is supported by the legislative history of the second sentence of § 182(a). The provision first appeared in § 218(a) of the Revenue Act of 1918. As originally introduced, that section of the House bill which became the Revenue Act of 1918 provided for the taxation of the partner's distributive share of the net income of the partnership for "the last annual accounting period of the partnership", ending within his taxable year. By amendment the quoted phrase was stricken from the bill and the words "any accounting period of the partnership" substituted. See H. R. 12863, 65th Cong., 3rd Sess. (Committee Print — As Agreed to in Conference). The amendment was obviously inconsistent with any purpose to limit the amount of the taxable income to that of any single or particular accounting period of the partnership ending within the partner's taxable year. The phrase was changed by § 182(a) of the Revenue Act of 1928 to its present form, "any taxable year of the partnership". The continued use of the word "any" as qualifying the phrase "taxable year" in the 1928 and 1932 Acts, does not preclude the present tax if "taxable year" be taken to mean a partnership accounting period of less than twelve months. Reasons have already been given why, if it means an accounting period of a full year, the present tax is nevertheless due under § 41 and the first sentence of § 182(a).

Affirmed.

Mr. Justice McReynolds and Mr. Justice Roberts are of opinion that the judgment should be reversed.

Mr. Justice Cardozo and Mr. Justice Reed took no part in the consideration or decision of this case.